Superintendent of Land and Survey Department Kuching-Divisional Office & Anor v Ratnawati bt Hasbi Mohamad Suleiman

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-27–08 OF 2018(Q)
TENGKU MAIMUN CHIEF JUSTICE, DAVID WONG CJ (SABAH AND SARAWAK), ROHANA YUSUF, IDRUS HARUN AND NALLINI PATHMANATHAN FCJJ
15 JANUARY 2020

Constitutional Law — Constitution — Pre-Merdeka law — Whether court had mandatory duty under art 162(6) of the Federal Constitution to modify pre-Merdeka law so that it accorded with provisions of the Federal Constitution — Whether state had wrongfully acquired landowner's land in breach of art 13 of the Federal Constitution court had duty to order state to return/reinstate the land to landowner — Whether court could not be barred by s 29(1)(b) of the Government Proceedings Act 1956 ('the GPA') from making order for recovery of land against government as GPA was a pre-Merdeka law whose provisions had to be modified to accord with provisions of the Federal Constitution

Land Law — Acquisition of land — Declaration of acquisition — Minister issued declaration under s 48 of the Sarawak Land Code ('the SLC') to compulsorily acquire land for public purpose — Whether s 48 declaration lapsed or extinguished when procedures for resumption of land to the state concluded — Whether failure of Superintendent of Lands and Surveys ('SLS') to inform landowner of inquiry hearing to determine compensation payable for acquisition nullified entire acquisition process — Whether such failure was non-fatal irregularity that did not cause substantial injustice to landowner — Whether act of SLS to cancel first resumption exercise and convene fresh inquiry to hear landowner on the matter of compensation cured any invalidity in the resumption exercise

In August 2011, the respondent bought a piece of land ('the land') knowing that the Minister had issued a declaration for its acquisition for a public purpose under s 48 of the Sarawak Land Code ('the SLC') on 2 July 2009. Pursuant to that declaration, the first appellant ('A1') issued a s 49 notice requiring the respondent to attend at an inquiry ('the first inquiry') to determine the compensation payable to her. Due to a typographical error in the description of her address, the notice was never served on the respondent. A1 nevertheless proceeded with the inquiry in the respondent's absence and awarded her RM811,693.89 as compensation. This was the market value of the land when the s 48 declaration was made. A1 thereafter registered a

memorandum of declaration of resumption of land ('MDRL') and took possession of the land under the SLC. When the respondent later found out that the land was no longer in her name, she complained to A1 that the land had been acquired without her knowledge. In an attempt to make good the failure to serve the notice of the first inquiry on the respondent, A1 rectified the land register under s 136 of the SLC by reinstating the respondent as the owner of the land and then issued her a fresh s 49 notice to attend a second inquiry which was held in 2013. At that inquiry, which the respondent attended together with her lawyer and property valuer, A1 awarded the respondent the same compensation sum that was awarded at the first inquiry. The respondent accepted the sum under protest and applied for the matter to be referred to the High Court under s 56 of the SLC to determine the validity and quantum of the award. A1 registered a second MDRL in respect of the land and paid the respondent the compensation sum. Before A1 could refer the matter to the High Court, the respondent sued the appellants for a host of declarations including: (a) that A1's failure to comply with the mandatory provisions of ss 49 and 51–54 of the SLC was fatal and rendered the whole acquisition exercise null and void; (b) that when the land reverted to the state following the first resumption exercise, the s 48 declaration lapsed and the land should have been re-alienated to her and the land acquired afresh starting with the issuance of a new s 48 declaration; and (c) that since the s 48 declaration had lapsed in the invalid first resumption exercise and the land had reverted to the state without being re-alienated to her, the holding of the second inquiry and the awarding of compensation therein were invalid. The respondent also sought special and general damages. The High Court dismissed the respondent's claim and held that, inter alia: (i) the s 48 declaration remained valid unless it was withdrawn by the Minister under s 79 of the SLC. Also, nothing in the SLC stated that the declaration would lapse or extinguish on the completion of a land resumption exercise; (ii) the s 48 declaration was a Ministerial decision to acquire the land and was unaffected by A1's failure to inform the respondent of the inquiry date as that failure only related to the issue of compensation; in any event, that failure was cured by the holding of the second inquiry to hear the respondent on the issue of compensation; and (iii) the compensation awarded to the respondent complied with s 60(1)(a) of the SLC, which provided that the amount shall be the market value of the land when the s 48 declaration was made. The Court of Appeal ('COA') unanimously allowed the respondent's appeal and set aside the High Court's decision. Inter alia, the COA: (1) declared that A1's failure to comply with the mandatory provisions of ss 49 and 51–54 of the SLC rendered the entire acquisition of the land null and void and breached the respondent's rights under art 13 of the Federal Constitution; (2) ordered the status quo of the land prior to the first resumption exercise to be reinstated and that the land be re-alienated to the respondent under s 15A of the SLC; (3) held that the s 48 declaration lapsed or extinguished with the completion of the first resumption exercise and there was no basis on which the second inquiry and related resumption procedures could have proceeded;

A (4) allowed the Minister liberty to make a fresh s 48 declaration in respect of the land; (5) ordered the respondent to repay to the second appellant the compensation monies she had received; and (6) allowed the respondent's claims for special and general damages as assessed by the court. Among the questions of law posed to the Federal Court in the instant appeal against the B COA's decision, was: (A) whether the COA had no jurisdiction to order the land to be reinstated and re-alienated to the respondent in view of s 29(1)(b) of the Government Proceedings Act 1956 which prohibited a court from making an order for recovery of land against the government; and (B) whether the s 48 declaration lapsed or extinguished when the first resumption exercise C concluded.

Held, by majority, allowing the appeal, setting aside the COA's decision and restoring the High Court's decision:

D (1) (**per Idrus Harun FCJ, majority**) The COA's order of reinstatement and re-alienation of the land to the respondent under s 13 or s 15A of the SLC was akin to an order for recovery of land against the government (the second appellant) which the court had no power to make under s 29(1)(b) of the Government Proceedings Act 1956. The order was not E only bad but a nullity and had to be set aside (see paras 121, 123 & 126).

(2) (**per Idrus Harun FCJ, majority**) Until it was withdrawn by the Minister or declared to be invalid, the s 48 declaration remained in full force and effect. The scheme of compulsory acquisition of land in Part IV F of the SLC did not provide that a s 48 declaration would lapse or become extinguished upon the completion of a resumption process of any land under that Part. On the contrary, s 16 of the Sarawak Interpretation Ordinance 2005 empowered the Minister to withdraw the s 48 declaration. The COA did not order the Minister to withdraw the land G from the acquisition, nor did the Minister himself withdraw the s 48 declaration. As such, the COA's finding that the s 48 declaration had lapsed or extinguished could not be sustained. The s 48 declaration had to be withdrawn by the Minister before the land could be returned to the condition that existed prior to the said declaration (see paras 134–136).

H (3) (**per Idrus Harun FCJ, majority**) A1 was not the cause of the land being resumed by the Government. It was the Minister who decided that the land should be resumed. As such, A1's alleged negligence in the process of assessing compensation in the second stage of the resumption process could not nullify the Minister's decision at the first stage of the process to I declare that the land be acquired for a public purpose. The procedural provisions in ss 49 and 51–54 of the SLC only related to the second stage of the resumption process in the determination of compensation payable and the resumption of the land after compensation had been awarded. A1's 'error', if any, only affected the quantum of compensation to be paid.

The procedural provisions did not affect the Minister's decision to resume the land under s 48 of the SLC (see para 137).

(4) (**per Idrus Harun FCJ, majority**) The land was acquired in accordance with art 13 of the Federal Constitution. The award of RM811,693.89 to the respondent was 'adequate compensation' because A1 had complied with s 60 of the SLC in awarding the compensation based on the market value of the land as at the date of the s 48 declaration. The respondent did not challenge the appellants' valuation report or provide any contrary valuation of the land as at the date the s 48 declaration was made (see paras 141–143).

(5) (**per Idrus Harun FCJ, majority**) The trial court found as a fact that the respondent was heard at the second inquiry which she attended together with her lawyer and a professional private valuer. The COA therefore misdirected itself in finding that A1 had violated the respondent's right to be heard. The COA's judgment falsely implied that A1 had acted arrogantly or arbitrarily or in an excessive manner. However, it was established at the trial that the mistake in sending the notice of the first inquiry to the wrong address was genuine and not deliberately caused to deprive the respondent of the opportunity to be heard; hence, there was no such thing that the respondent was wrongfully deprived of her property or that she was inadequately compensated for the acquisition of her land (see paras 143–145).

(6) (**per Idrus Harun FCJ, majority**) The alleged non-compliance with the statutory provisions relating to the assessment of compensation for the acquisition of the land was not a fatal irregularity since the compensation was based on the date the s 48 declaration was made as prescribed by s 60(1)(a) of the SLC. Therefore, the respondent did not suffer any loss or substantial injustice as a result of the alleged procedural lapse and there was no basis for the resumption of the land to be invalidated and deemed to have lapsed or extinguished or for the ownership of the land to be reinstated or re-alienated to the respondent (see paras 147 & 151).

(7) (**per David Wong CJ (Sabah and Sarawak), dissenting**) Reading the SLC as a whole, once land resumed to the state, the s 48 notice would, upon such resumption, extinguish. Otherwise, there would be the absurd situation where once land had resumed to the state and was thereafter re-alienated by the government, the s 48 declaration would continue to survive. That could not be right. Following the completion of the first inquiry and the taking of possession of the land by the state, the entire acquisition procedure was exhausted and the government became at liberty to re-alienate the land under s 15A of the SLC. The appellants had exhausted, used up or spent the whole of their acquisition powers right from s 48 up until s 54 of the SLC. This did not mean the s 48 declaration had been nullified but that it was already spent or expired in the first

resumption exercise (see paras 31, 41–43 & 50).

(8) (**per David Wong CJ (Sabah and Sarawak)**) The first resumption exercise was nullified by A1's failure to give the respondent a chance to be heard at the first inquiry. As the s 48 declaration was spent or expired in the unlawful first resumption exercise, the net effect was that when the register was rectified to revert the land to the respondent's name, it was done without the s 48 declaration attached. The respondent once again became the indefeasible owner of the land and the appellants had to start the acquisition process all over again. The s 48 declaration did not, in law, survive once the land reverted to the respondent in the manner aforesaid. The failure to start the whole process from point zero resulted in the unlawful deprivation of the respondent's property in breach of art 13(1) of the Federal Constitution (see paras 27, 45–46, 50 & 86).

(9) (**per David Wong CJ (Sabah and Sarawak)**) Section 29(1)(b) of the Government Proceedings Act 1956 ('the GPA') could not bar an order for the reinstatement of the land in favour of the respondent or prohibit the Court from granting the respondent an order for the recovery of her land where the action concerned a violation of her rights to her property under art 13(1) of the Federal Constitution. This was because the GPA was a pre-Merdeka law and the Court had a mandatory duty under art 162(6) of the Federal Constitution to modify s 29(1)(b) to bring it into accord with the provisions of the Constitution. The respondent had been unlawfully deprived of her land and the Courts could not say that they were barred by s 29(1)(b) from granting her an order for the recovery of the land. Section 29(1)(b) of the GPA had to be modified to insert after the words 'shall not' the phrase 'save where the action concerns a violation of a right guaranteed by the Federal Constitution'. With that modification, s 29(1)(b) of the GPA would no longer prohibit the making of an order for recovery of land where the action concerned a violation of a constitutionally-guaranteed right (see paras 67–68, 70–71 & 88).

(10) (**per David Wong CJ (Sabah and Sarawak)**) It was incorrect for the COA to have ordered the 're-alienation' of the land to the respondent. The second resumption exercise was unlawful and void ab initio because of the failure to comply with the strict legal requirements of the SLC. 'Re-alienation' was only possible under s 15A of the SLC if the resumption itself was lawful. Hence, the more appropriate order was for the title of the respondent to the subject land to be 'reinstated' (see para 87).

[Bahasa Malaysia summary

Pada Ogos 2011, responden telah membeli sebidang tanah ('tanah tersebut') dengan pengetahuan bahawa Menteri telah mengeluarkan deklarasi untuk

pengambilalihannya bagi tujuan awam di bawah s 48 Kanun Tanah Sarawak ('Kanun') pada 2 Julai 2009. Menurut deklarasi itu, perayu pertama ('A1') telah mengeluarkan notis s 49 menghendaki responden menghadiri satu siasatan ('siasatan pertama') untuk menentukan pampasan yang kena dibayar kepadanya. Akibat kesilapan tipografi dalam perihalan alamatnya, notis itu tidak pernah disampaikan ke atas responden. A1 walau bagaimanapun telah meneruskan dengan siasatan itu tanpa kehadiran responden dan mengawardkannya RM811,693.89 sebagai pampasan. Ini merupakan nilai pasaran tanah tersebut apabila deklarasi s 48 dibuat. A1 kemudian telah mendaftarkan memorandum pengisytiharan semula tanah ('MPST') dan mengambil milikan tanah tersebut di bawah Kanun. Apabila responden kemudian mendapati bahawa tanah tersebut tidak lagi dalam namanya, dia mengadu kepada A1 bahawa tanah tersebut telah diperolehi tanpa pengetahuannya. Dalam usaha memperbetulkan kegagalan untuk menyampaikan notis siasatan pertama ke atas responden, A1 telah membetulkan pendaftaran tanah di bawah s 136 Kanun dengan mengembalikan semula responden sebagai pemilik tanah tersebut dan kemudian mengeluarkan notis s 49 baru untuk menghadiri siasatan kedua yang diadakan pada 2013. Semasa siasatan tersebut, yang dihadiri responden bersama peguamnya dan penilai harta, A1 telah mengawardkan responden jumlah pampasan yang sama diawardkan semasa siasatan pertama itu. Responden telah menerima jumlah itu dengan protes dan memohon agar hal perkara itu dirujuk kepada Mahkamah Tinggi di bawah s 56 Kanun untuk menentukan kesahihan dan kuantum award itu. A1 telah mendaftarkan MPST kedua berkaitan tanah tersebut dan membayar responden jumlah pampasan itu. Sebelum A1 boleh merujuk hal perkara itu kepada Mahkamah Tinggi, responden telah menyaman perayu-perayu untuk beberapa deklarasi termasuk: (a) bahawa kegagalan A1 untuk mematuhi peruntukan-peruntukan mandatori ss 49 dan 51 Kanun adalah memudaratkan dan menjadikan keseluruhan proses pengambilalihan itu terbatal dan tidak sah; (b) bahawa apabila tanah tersebut dikembalikan kepada kerajaan negeri berikutan proses pengembalihan semula pertama itu, deklarasi s 48 telah luput dan tanah tersebut sepatutnya diberi milikan semula kepadanya dan tanah tersebut yang diperolehi semula dengan mulanya keluaran deklarasi s 48 baru; dan (c) bahawa memandangkan deklarasi s 48 telah luput dalam proses pengembalian semula pertama dan tanah tersebut telah dikembalikan kepada kerajaan negeri tanpa diberi milikan semula kepadanya, dengan mengadakan siasatan kedua dan mengawardkan pampasan tersebut adalah tidak sah. Responden juga memohon ganti rugi khas dan am. Mahkamah Tinggi telah menolak tuntutan responden dan memutuskan bahawa, antara lain: (i) deklarasi s 48 kekal sah kecuali jika ia ditarik balik oleh Menteri di bawah s 79 Kanun. Juga, tiada apa-apa dalam Kanun yang menyatakan bahawa deklarasi itu akan luput atau terbatal apabila selesai proses pengembalian tanah; (ii) deklarasi s 48 adalah keputusan Menteri untuk memperoleh tanah tersebut dan tidak terjejas dengan kegagalan A1 untuk memberitahu

responden tentang tarikh siasatan kerana kegagalan tersebut hanya berkaitan isu pampasan; dalam apa keadaan, bahawa kegagalan tersebut dipulihkan dengan mengadakan siasatan kedua untuk mendengar responden berhubung isu pampasan; (iii) pampasan yang diawardkan kepada responden mematuhi s 60(1)(a) Kanun, yang memperuntukkan bahawa jumlah itu adalah nilai pasaran tanah tersebut apabila deklarasi s 47 dibuat. Mahkamah Rayuan ('MR') sebulat suara membenarkan rayuan responden dan mengetepikan keputusan Mahkamah Tinggi. Antara lain, MR telah: (1) mengisytiharkan bahawa kegagalan A1 untuk mematuhi peruntukan-peruntukan mandatori ss 49 dan 51–54 Kanun menjadikan keseluruhan pengambilalihan tanah tersebut adalah terbatal dan tidak sah dan telah melanggar hak responden di bawah perkara 13 Perlembagaan Persekutuan; (2) memerintahkan status quo tanah tersebut sebelum proses pengembalian semula pertama dikembalikan dan bahawa tanah tersebut diberi milikan semula kepada responden di bawah s 15A Kanun; (3) memutuskan bahawa deklarasi s 48 telah luput atau terbatal dengan siapnya proses pengembalian semula pertama dan tiada asas untuk siasatan kedua dan prosedur pengembalian semula berkaitan boleh diteruskan; (4) membenarkan Menteri bebas membuat deklarasi s 48 baru berkaitan tanah tersebut; (5) memerintahkan responden membayar balik perayu kedua wang pampasan yang telah diterimanya; dan (6) membenarkan tuntutan responden untuk ganti rugi khas dan am sebagaimana ditaksir oleh mahkamah. Antara persoalan undang-undang yang dikemukakan kepada Mahkamah Persekutuan dalam rayuan ini terhadap keputusan MR, adalah: (A) sama ada MR tidak mempunyai bidang kuasa untuk memerintahkan tanah tersebut dikembalikan dan diberi milikan semula kepada responden memandangkan s 29(1)(b) Akta Prosiding Kerajaan 1956 yang melarang mahakmah daripada membuat perintah untuk pengembalian semula tanah tersebut terhadap kerajaan; dan (B) sama ada deklarasi s 48 telah luput atau terbatal apabila proses pengembalian semula pertama telah selesai.

Diputuskan, melalui majoriti, mengetepikan keputusan MR dan mengekalkan keputusan Mahkamah Tinggi:

(1) (**oleh Idrus Harun HMP, majoriti**) Perintah pengembalian dan pemberian milikan semula tanah tersebut oleh MR kepada responden di bawah s 13 atau s 15A Kanun adalah sama dengan perintah untuk pengembalian tanah terhadap kerajaan (perayu kedua) yang mana mahkamah tiada kuasa untuk buat di bawah s 29(1)(b) Akta Prosiding Kerajaan 1956. Perintah itu bukan sahaja tidak sah tetapi adalah terbatal dan perlu diketepikan (lihat perenggan 121, 123 & 126).

(2) (**oleh Idrus Harun HMP, majoriti**) Sehingga ia ditarik balik oleh Menteri atau diisytharkan tidak sah, deklarasi s 48 kekal berkuat kuasa. Skim pengambilalihan wajib tanah dalam Bahagian IV Kanun tidak memperuntukkan bahawa deklarasi s 48 akan luput atau terbatal setelah selesai proses pengembalian semula mana-mana tanah di bawah

Bahagian tersebut. Sebaliknya, s 16 Ordinan Tafsiran Sarawak 2005 memberi kuasa kepada Menteri untuk menarik balik deklarasi s 48. MR tidak memerintahkan Menteri untuk menarik balik tanah tersebut daripada pengambilalihan, mahu pun Menteri sendiri telah menarik balik deklarasi s 48 itu. Oleh itu, dapatan MR bahawa deklarasi s 48 telah luput atau terbatal tidak boleh dikekalkan. Deklarasi s 48 perlu ditarik balik oleh Menteri sebelum tanah tersebut boleh dikembalikan kepada keadaan yang wujud sebelum deklarasi tersebut (lihat perenggan 134–136).

(3) (**oleh Idrus Harun HMP, majoriti**) A1 bukan sebab tanah tersebut diambil semula oleh kerajaan. Ia adalah Menteri yang memutuskan bahawa tanah tersebut patut dikembalikan. Oleh itu, kecuaian A1 yang dikatakan dalam prose mentaksir pampasan di peringkat kedua proses pengembalian semula itu tidak membatalkan keputusan Menteri di peringkat pertama proses itu untuk mengisytiharkan bahawa tanah tersebut diperolehi untuk tujuan awam. Peruntukan procedural ss 49 dan 51–54 Kanun hanya berkaitan peringkat kedua proses pengembalian semula itu dalam penentuan pampasan yang kena dibayar dan pengembalian semula tanah tersebut selepas pampasan telah diawardkan. 'Error' A1, jika ada, hanya menjejaskan pampasan yang perlu dibayar. Peruntukan procedural tidak menjejaskan keputusan Menteri untuk mengambil semula tanah tersebut di bawah s 48 Kanun (lihat perenggan 137).

(4) (**oleh Idrus Harun HMP, majoriti**) Tanah tersebut telah diperolehi menurut perkara 13 Perlembagaan Persekutuan. Award RM811,693.89 kepada respodnen adalah 'adequate compensation' kerana A1 telah mematuhi s 60 Kanun dalam mengawardkan pampasan berdasarkan nilai pasaran tanah tersebut sehingga tarikh deklarasi s 48. Responden tidak mencabar laporan penilaian perayu-perayu atau mengemukakan apa-apa penilaian bertentangan tanah tersebut sehingga tarikh deklarasi s 48 itu dibuat (lihat perenggan 141–143).

(5) (**oleh Idrus Harun HMP, majoriti**) Mahkamah perbicaraan mendaati pada hakikatnya bahawa responden telah didengar semasa siasatan kedua yang dihadirinya bersama peguamnya dan penilai persendirian profesional. MR dengan itu telah salah arah kerana mendapati bahawa A1 telah melanggar hak responden untuk didengar. Penghakiman MR secara palsu tersirat bahawa A1 telah bertindak melulu atau sewenang-wenangnya atau melampau. Walau bagaimanapun, ia dibuktikan semasa perbicaraan bahawa kesilapan dalam menghantar notis siasatan pertama kepada alamat yang salah adalah tulen dan tidak sengaja menyebabkan responden dinafikan peluang untuk didengar; justeru, tiada apa-apa bahawa responden itu telah dinafikan hartanya secara salah atau bahawa dia diberi pampasan yang tidak mencukupi

untuk pemerolehan tanahnya (lihat perenggan 143–145).

(6) (**oleh Idrus Harun HMP, majoriti**) Ketidakpatuhan yang dikatakan dengan peruntukan-peruntukan statutori berkaitan penaksiran pampasan untuk pemerolehan tanah terebut bukan luar aturan yang memudaratkan kerana pempasan itu berdasarkan tarikh deklarasi s 48 yang dibuat sebagaimana ditetapkan oleh s 60(1)(a) Kanun. Oleh demikian, responden tidak mengalami apa-apa kerugian atau ketidakadilan substantial akibat prosedur yang dikatakan telah luput dan terbatal atau untuk pemilikan tanah tersebut dikembalikan dan diberi milikan semula kepada responden (lihat perenggan 147 & 151).

(7) (**oleh David Wong HB (Sabah dan Sarawak), menentang**) Jika Kanun dibaca secara keseluruhan, selepas tanah dikembalikan kepada kerajaan negeri, notis s 48 akan, dengan pengembalian semula tersebut terbatal. Jika tidak, akan terdapat keadaan tidak masuk akal di mana selepas tanah dikembalikan semula kepada kerajaan negeri dan berikutan itu diambil alih oleh kerajaan, deklarasi s 48 akan terus kekal. Ini tidak betul. Setelah siasatan pertama selesai dan pengambilalihan milikan tanah tersebut oleh kerajaan negeri, keseluruhan prosedur pemerolehan telah dilaksanakan dan kerajaan adalah bebas untuk mengambil alih semula tanah tersebut di bawah s 15A Kanun. Perayu-perayu telah melaksanakan, menggunakan atau menggunapakai kesemua kuasa pemerolehan dari s 48–54 Kanun. Ini tidak bermaksud deklarasi s 48 terbatal tetapi ia telahpun terpakai atau luput dalam proses pengembalian semula pertama (lihat perenggan 31, 41–43 & 50).

(8) (**oleh David Wong HB (Sabah dan Sarawak), menentang**) Proses pengembalian semula pertama telah terbatal akibat kegagalan A1 untuk memberikan responden peluang untuk didengar semasa siasaan pertama. Oleh kerana deklarasi s 48 telah terpakai atau luput dalam proses pengembalian semula pertama yang tidak sah, kesan menyeluruh adalah bahawa apabila daftar dibetulkan untuk mengembalikan tanah tersebut kepada nama responden, ia dilakukan tanpa dilampirkan deklarasi s 48 itu. Responden sekali lagi menjadi pemilik tanah terebut yang tidak boleh disangkal dan perayu-perayu perlu memulakan semua proses pemerolehan itu semula. Deklarasi s 48 tidak, dari segi undang-undang, kekal apabila tanah tersebut dikembalikan kepada responden dengan cara yang dinyatakan. Kegagalan untuk memulakan keseluruhan proses itu dari awal lagi mengakibatkan penafian harta responden secara tidak sah yang melanggar perkara 13(1) Perlembagaan Persekutuan (lihat perenggan 27, 45–46, 50 & 86).

(9) (**oleh David Wong HB (Sabah dan Sarawak), menentang**) Seksyen 29(1)(b) Akta Prosiding Kerajaan 1956 ('APK') tidak menghalang perintah untuk pengembalian semula tanah yang berpihak kepada respodnen atau melarang mahkamah daripada memberikan responden

perintah untuk pengembalian tanahnya di mana tindakan adalah berkenaan pelanggaran haknya terhadap hartanya di bawah perkara 13(1) Perlembagaan Persekutuan. Ini adalah kerana APK adalah undang-undang sebelum Merdeka dan mahkamah mempunyai kewajipan mandatori di bawah perkara 162(6) Perlembagaan Persekutuan untuk mengubahsuai s 29(1)(b) agar ia menurut peruntukan-peruntukan Perlembagaan. Responden telah dinafikan tanahnya secara tidak sah dan mahkamah tidak boleh mengatakan bahawa ia dihalang oleh s 29(1)(b) daripada memberikan perintah untuk pengembalian tanah tersebut. Seksyen 29(1)(b) APK perlu diubahsuai untuk memasukkan selepas perkataan-perkataan 'shall not' frasa 'save where the action concerns a violation of a right guaranteed by the Federal Constitution'. Dengan pengubahsuaian tersebut, s 29(1)(b) APK tidak lagi melarang perintah untuk pengembalian tanah dibuat di mana tindakan adalah berkaitan pelanggaran hak yang dijamin perlembagaan (lihat perenggan 67–68, 70–71 & 88).

(10) (**oleh David Wong HB (Sabah dan Sarawak), menentang**) Adalah tidak wajar untuk MR memerintahkan 're-alienation' tanah tersebut kepada responden. Proses pengembalian semula kedua adalah menyalahi undang-undang dan tidak sah ab initio kerana kegagalan untuk mematuhi keperluan ketat perundangan Kanun. 're-alienation' hanya mungkin berlaku di bawah s 15A Kanun jika pengembalian semula itu sendiri sah di sisi undang-undang. Justeru, perintah yang lebih sesuai adalah agar hak milik responden kepada tanah yang diperkatakan ini 'reinstated' (lihat perenggan 87).]

Cases referred to

Assa Singh v Menteri Besar, Johore [1969] 2 MLJ 30, FC (refd)

Buan Joong Sdn Bhd v Superintendent of Lands & Surveys Kuching Division [2005] 5 MLJ 404; [2005] 2 CLJ 910, CA (refd)

Goh Seng Peow & Sons Realty Sdn Bhd v Collector of Land Revenue, Wilayah Persekutuan [1986] 2 MLJ 395 (refd)

Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor [1986] 2 MLJ 198; [1986] CLJ Rep 149, SC (folld)

Jais bin Chee & Ors v Superintendent of Lands and Surveys Kuching Division, Kuching [2014] 6 MLJ 439; [2014] 3 CLJ 467, CA (refd)

Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)

Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals [2018] 3 MLJ 184, FC (refd)

Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad [1981] 1 MLJ 234; [1980] 1 LNS 150, FC (refd)

Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors

[1982] 2 MLJ 162; [1982] CLJ Rep 182, FC (refd)
Minister for Immigration and Citizenship v Kumar (2009) 238 CLR 448, HC (refd)
Minister for Immigration and Citizenship v SZIZO (2009) 238 CLR 627, HC (refd)
Minister for Immigration and Citizenship v SZKTI (2009) 238 CLR 489, HC (refd)
Neyveli Lignite Corporation Ltd, represented by the Secretary, Neyveli-1 Versus PR Govindarajulu and others (1993) 2 MLJ 523, HC (refd)
Ngu Toh Tung & Ors v Superintendent of Lands & Surveys, Kuching Division, Kuching & Anor [2006] 1 MLJ 142, CA (refd)
Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors [1986] 1 MLJ 362; [1986] CLJ Rep 33, PC (refd)
Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau) Pulau Pinang v Kam Gin Paik & Ors [1983] 2 MLJ 390, FC (refd)
Penang Development Corporation v Teoh Eng Huat & Anor [1993] 2 MLJ 97; [1993] 2 CLJ 283, SC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24, HC (refd)
Superintendent of Lands & Surveys Samarahan Division v Surianto Abdul Hamid & Anor [2016] 3 CLJ 591, CA (refd)
Superintendent of Lands & Surveys, Fifth Division, Limbang v Lim Teck Hoo & Anor [1980] 1 MLJ 58; [1979] 1 LNS 103, SC (folld)
Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)
Tan Tock Kwee & Anor v Tey Siew Cha & Anor [1995] MLJU 408; [1995] 4 CLJ 658, HC (refd)
Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd [2019] 1 MLJ 1, FC (refd)
Wazir Chand v State of HP [1955] 1 SCR 408, SC (refd)

Legislation referred to

Civil Law Act 1956 s 8(2)(a)
Courts of Judicature Act 1964 s 96
Criminal Procedure Code [IND]
Federal Constitution arts 4(1), 5(1), 13, 13(1), (2), 162, 162(4), (5), (6), (7)
Government Proceedings Act 1959 s 29, 29(1)(b)
Land Acquisition Act 1960 ss 8, 10(1)
Madras Land Acquisition Act 1894 [IND] s 20(d)
Migration Act 1958 [AUS] s 424A, 424A(2)

Sarawak Interpretation Ordinance 2005 (Cap 61) s 16
Sarawak Land Code (Cap 81) ss 13, 15A, 15A(1)(b), 46, 47, 48, 49, 51, 52, 53, 54, 56(i), 57, 60, 60(1)(a), 79, 136, Part IV

Appeal from: Civil Appeal No Q-01 (NCvC)(W)-98–04 of 2016 (Court of Appeal, Putrajaya)

Fong Joo Chung (Evy Liana bt Atang with him) (Sarawak State Attorney General's Chambers) for the appellant.
William Ding (William Ding & Co Advocates) for the respondent.

David Wong CJ (Sabah and Sarawak) (delivering dissenting judgment of the court):

INTRODUCTION

[1] I have had the benefit of reading the draft judgment of my learned brother Idrus Harun FCJ and with regret and respect I find myself in disagreement with the same. As the draft judgment represents the majority view, I am constrained to write a separate judgment. This is that judgment.

[2] As my learned brother has ably and succinctly set out the largely undisputed facts, I adopt the same.

[3] The five questions of law framed for determination in this appeal, in my view, can be resolved by determining the following two questions:

(a) in a compulsory land acquisition exercise under the Sarawak Land Code ('the Code'), would a failure to comply with any mandatory provision of the acquisition procedure by the acquiring authority render the entire acquisition process null, void and of no effect; and

(b) if the answer to the above question is in the affirmative, would s 29(1)(b) of the Government Proceedings Act 1956 ('Act 359') prohibit the court from making an order for recovery of land resulting from the government's unlawful acquisition?

[4] The Court of Appeal had sustained the position of the respondent which in essence is that there had been a non-compliance of the provisions of the land acquisition process set out in the Code resulting in an order of the court ordering the acquired land to be re-alienated back to the respondent.

[5] Having studied the rationale of both the High Court and the Court of

Appeal and taking into consideration of respective submissions of counsel, I am minded to agree with the reasoning of the Court of Appeal which, in my considered view, had taken the correct and only available approach to dissect the issues before them. Hence, I would dismiss the appeal, and affirm the Court of Appeal's order dated 27 October 2017. My reasons are as follows.

MY REASONS

The operation of art 13(1) of the Federal Constitution generally

[6] The starting point of any discussion on compulsory acquisition of land in this country must be art 13(1) of the Federal Constitution which reads as follows:

> No person shall be deprived of property save in accordance with law.

[7] The critical phrase for my consideration is simply 'in accordance with law': Though there appears to be scant attention by the courts on what the aforesaid phrase entails in the context of art 13(1) of the Federal Constitution, it is not difficult to comprehend what it entails. In simple and plain English, the law is what is prescribed in the acquisition of land provisions of the Code and if there has been any noncompliance with those provisions, the acquisition would not have been done 'in accordance with law' and hence there would be a constitutional breach. The consequence would render the acquisition void and invalid.

[8] The rationale for such a phrase 'in accordance with law' can be gleaned analogously from the dictum of Raja Azlan Shah Ag CJ (Malaya) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 ('Sri Lempah') where His Lordship said as follows, at p 148:

> In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: *so that the courts can see that these great powers and influence are exercised in accordance with law.* I would once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place' (per Danckwerts LJ in *Bradbury v London Borough of Enfield* [1967] 3 All ER 434 *442). The Land Executive Committee is a creature of statute, and therefore possesses only such power as may have been conferred on it by Parliament.*
>
> Therefore when a power vested in it is exceeded, any act done in excess of the power is invalid as being ultra vires. If authority is needed for what may be considered as axiomatic, I need only refer to the cases of *Chertsey UDC v Mixnam's Properties, Ltd* [1964] 2 All ER 627 and *Hall & Co Ltd v Shoreham-by-Sea UDC* [1964] 1 WLR 240. (Emphasis added.)

[9] In the present case, the relevant law applicable is the Code. The Code therefore operates as a restriction on the right to possess property and, bearing in mind that ownership of property is a constitutional right, the provisions of the Code must accordingly be read with the utmost scrutiny.

[10] I agree with the manner in which the majority deals with the land acquisition procedure, in ss 47–49, 51 and 53–54 of the Code based on decided cases. For instance, it is trite that ss 47–48 may operate severally or jointly. It is also trite that once either declaration is issued, the time for assessing compensation freezes as at the date of the issuance of the relevant s 47 or s 48 declaration. What I disagree with however, is essentially on the legal ramifications of noncompliance with such provisions.

[11] Where I differ from the majority's view is that I approached the issues before this court with a constitutional flavour in that the respondent's deprivation of her land by the appellants must be considered in the context of art 13(1) of the Federal Constitution. And, it is trite that the court must take a vigilant and protective stand when confronted with issues pertaining to the rights guaranteed by the Federal Constitution. That is the oath that we, as judges, take when we assume the office of a judge: to preserve, protect and defend the Federal Constitution.

[12] The Supreme Court of India analogously explains this approach in the case of *Wazir Chand v State of HP* [1955] 1 SCR 408. In that case, the appellant's medicinal herbs had been seized due to an allegation that he was involved in embezzlement. The Supreme Court found, as a matter of course, that none of the provisions of the Indian Criminal Procedure Code had any application to enable the search and seizure of the appellant's goods. It therefore followed that the search and seizure was not countenanced in law.

[13] This is how Mahajan CJ put it:

> The procedure prescribed by the section was not followed. The Jammu and Kashmir police had no jurisdiction or authority whatsoever to carry out investigation of an offence committed in Jammu and Kashmir in Himachal territory without the authority of any law or under the orders of any magistrate passed under authority of any law. No such authority was cited before us. The whole affair was a hole-and-corner affair between the officers of the Kashmir police and of the Chamba police without any reference to any magistrate.
>
> *It is obvious that the procedure adopted by the Kashmir and the Chamba police was in utter violation of the provisions of law and could not be defended under cover of any legal authority.* That being so, the seizure of these goods from the possession of the petitioner or his servants amounted to an infringement of his fundamental rights both under article 19 and article 31 of the Constitution and relief should have been granted to him under article 226 of the Constitution.

A All that the Solicitor-General could urge in the case was that on the allegation of Prabhu Dayal, the goods seized in Chamba concerned an offence that had been committed in Jammu and being articles regarding which an offence had been committed, the police was entitled to seize them and that Wazir Chand had no legal title in them. *Assuming that that was so, goods in the possession of a person who is not*
B *lawfully in possession of them cannot be seized except under authority of law, and in absence of such authority, Wazir Chand could not be deprived of them.* (Emphasis added.)

[14] What is stated by learned Chief Justice Mahajan requires no further
C explanation from me as his words are self-explanatory. With that, I now move to my deliberation on the Code.

Interpretation of the Sarawak Land Code and the unlawful deprivation of the respondent's land

D

[15] It is undisputed that when the appellants realised their mistake of serving the s 49 notice at the wrong address, they cancelled the first compensation award. But, by that time, the land had already resumed to the
E appellants in that the land had been registered to them. In their attempt to remedy, they cancelled the resumption purportedly under s 136 of the Code by way of a memorandum of rectification dated 13 September 2013. Let me state here that this cancellation by the appellants is a clear admission that they had not complied with the relevant provisions. The consequence of such admission
F is telling as shown in the paragraphs below.

[16] The position of the respondent is simple and clear and that is, once the s 136 cancellation was effected, the appellants and the respondent reverted to the *status quo ante* the issuance of the defective s 49 notice.

G

[17] However, the appellants' position is this. The effect of the s 136 cancellation was only to nullify the first s 49 notice and that the s 48 declaration survived the cancellation. And since s 48 survives, there was no necessity to reissue a fresh s 49 notice on the surviving s 48 declaration.

H

[18] With respect, that contention cannot be correct in law and I shall give my reasons later in my judgment. At this point in time, I would like to refer to cases which set out the legal principles on the effect of noncompliance with provisions which are mandatory in nature. Strict compliance to provisions
I regarding compulsory acquisition of land can be gleaned from the following cases.

[19] LC Vohrah J's judgment in *Goh Seng Peow & Sons Realty Sdn Bhd v Collector of Land Revenue, Wilayah Persekutuan* [1986] 2 MLJ 395 ('Goh Seng

Peow'), is on point. The facts, as gleaned from the headnotes, were these. A

[20] The applicant company became the registered owner of two lots of land in Kuala Lumpur. While developing the said land the applicant company was informed that the same had already been compulsorily acquired. The applicant-company wrote to the respondent asking for further information on the matter. The respondent forwarded copies of certain Forms issued pursuant to the Land Acquisition Act 1960. All these forms did not name the applicant-company as the registered owner of the lands. B

[21] The applicant company only came to know of the acquisition proceedings after the compensation award was made by the respondent. It accordingly contended that the acquisition proceedings were illegal, null and void since as it had no notice whatsoever of the purported acquisition proceedings and that the necessary notices and documents had not been duly served upon the registered owner (the applicant-company) as required by law. C D

[22] The government-respondent raised a preliminary objection contending that the procedure adopted by the applicant-company was incorrect and that the applicant-company could only ask for an order of certiorari to quash the proceedings as there was merely an error on the face of the record which made the proceedings only voidable and not void. E

[23] The learned judge was not inclined to uphold the preliminary objection. This is what he held at p 396 of his rather succinct judgment: F

> In the light of senior federal counsel's admission of the relevant facts in the applicant's affidavits, I agreed with counsel for the applicant-company that the acquisition of the lands had taken place contrary to the provisions of the Act and in breach of the fundamental rules of naturaljustice and I was of the view that the applicant-company had made out a case that its constitutional right might have been impinged contrary to art 13 thus entitling the applicant-company to seek a declaration. (Emphasis added.) G

[24] In the learned judge's view, there had been occasioned a breach of art 13 (presumably cl (1) thereof) and he had no hesitation, correctly so, to declare that the purported acquisition was null and void. H

[25] Another case on point is the judgment of the High Court at Madras in *Neyveli Lignite Corporation Ltd, represented by the Secretary, Neyveli-1 Versus PR Govindarajulu and others* (1993) 2 MLJ 523 ('Neyveli'). Section 20(d) of the Madras Land Acquisition Act 1894 mandatorily required the court to issue a notice specifying the day on which the court will proceed to determine objections against acquisition. The compensation awards were issued without first giving the petitioner the right to appear at the compensation hearing. The I

A petitioner accordingly filed a challenge at the Madras High Court to set aside the awards. It will be noticed that the facts of the case are strikingly similar to the facts in the present case.

B **[26]** In respect of the procedural non-compliance, this is what Lakshmanan J held, at paras 6 and 8:

> ... In my opinion, the noncompliance of the statutory provision provided under section 20(d) of the Land Acquisition Act is fatal to the case. Hence, the awards passed by the 3rd respondent without affording an opportunity to the interested person cannot be allowed to stand ...
>
> C
>
> For the foregoing reasons, I am of the view, that the awards of the 3rd respondent ... *are illegal, ab initio and unenforceable on the short ground of non-issue of statutory notice to the interested person, viz. the writ petitioner.* (Emphasis added.)

D **[27]** That is exactly what happened here. The difference between the above case and the present one is the reissuance of the s 49 notice. In my view, once the first compensation hearing was held without the presence of the respondent, and upon that hearing the land was acquired without giving her benefit of being heard, the entire process became void ab initio.

E

[28] I am aware that the majority and the appellants consider the exercise to have happened in two stages. Common to the two stages is the understanding that the s 48 declaration survived the s 136 cancellation. In light of the

F authorities cited above, once it has been determined that the entire process was void ab initio, it would mean that the s 48 declaration fell with the cancellation.

[29] If I may say so here, this case would have been different had the appellants realised from the very beginning that they had served the s 49 notice

G at the wrong address. They would have been at liberty to revoke it and later re-issue it at the correct address. The facts, however, are materially different. Like in *Neyveli*, the compensation hearing had already been conducted in the absence of the respondent. The land was thereafter registered to the appellants and they subsequently took physical possession of it. Thus, as far as the entire

H acquisition process was concerned, the entirety of the appellants' exercise of such powers under the Code was spent.

[30] This is also supported on a wholesome reading of the Code. I take for example s 15A(1)(b) thereof which reads as follows:

I

> 15A *Alienation of land surrendered, reverted or resumed to the Government*
>
> (1) Subject to the direction of the Minister and the provisions of Part Ill, the Director may —
>
> (b) *re-alienate* any alienated land which has been surrendered to or resumed by

the Government under *Part IV*, for any purposes specified in section 46. (Emphasis added.)

[31] Section 15A(1)(b) of the Code makes specific reference to the right of the government to re-alienate any land which has been resumed to it under Part IV. Part IV houses s 46 onward ie the very sections which are under scrutiny before us. Reading the Code as a whole, it is clear to me that once land resumes to the state, the s 48 notice will, upon such resumption, have extinguished. Otherwise, we would have an absurd situation where once land has resumed to the state and thereafter re-alienated by the government, that the said s 48 notice would continue to survive. That cannot of course, with respect, be considered correct.

[32] Instructive guidance can be gleaned from the Australian apex court in its 3–2 judgment in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24 ('SAAP'). Those in the majority were McHugh, Kirby and Hayne JJ; while the dissenting judges were Gleeson CJ and Gummow J.

[33] The facts were these. The appellant, an Iranian citizen, applied for a protection visa to gain entry into Australia. The delegate, before whom the application was first heard, refused it. The appellant then took the matter up to the refugee review tribunal ('RRT') which affirmed the delegate's decision. Aggrieved, the appellant further appealed to the Federal Court of Australia who also affirmed the delegate's refusal. She further appealed to the High Court of Australia. The majority allowed the appeal and held that the RRT had a committed ajurisdictional error.

[34] The issue was this. Section 424A of the Australian Migration Act 1958 generally requires the RRT to give the applicant particulars of any information that the RRT considers would be the reason, or part of the reason, for affirming the decision under review, to ensure, as far as reasonably practicable, that the applicant understands why it is relevant, and to invite the applicant to comment on it (per Gleeson CJ, at para 5).

[35] Section 424A(2) specifically prescribed a specific method for such information to be supplied to the applicant. The applicant's complaint was that the procedural steps were not complied with. The government's retort was that the appellant was illiterate and thus it would have served no useful purpose to deliver that document to her. In any event, the adverse matter had been brought to her attention and she was aware of what was going on. Thus, according to the government, the common law requirements of procedural fairness were complied with even if the section was breached.

[36] So, the question before the High Court was essentially whether a plain and formal breach of the statute was fatal to the hearing or not. The majority held that the statute was passed to ensure that specific safeguards would be complied with. Once a breach of the statute had been proved, what happened after or before would of no relevance and could not be used to cure such a breach. Thus, whether the common law requirements of procedural fairness were complied with or not were irrelevant once a breach of the formal procedure was established.

[37] The above proposition is best expressed in the separate judgment of McHugh J who at para 77, observed as follows:

> However, because the Act compels the Tribunal in the conduct of the review to take certain steps in order to accord procedural fairness to the applicant for review, before recording a decision, it would be an anomalous result if the Tribunal's decision were found to be valid, notwithstanding that the Tribunal has failed to discharge that obligation. It is not to the point that the Tribunal may have given the applicant particulars of the adverse information orally. It is also not to the point that in some cases it might seem unnecessary to give the applicant written particulars of adverse information (for example, if the applicant is present when the Tribunal receives the adverse information as evidence from another person and the Tribunal there and then invites the applicant orally to comment on it). *If the requirement to give written particulars is mandatory, then failure to comply means that the Tribunal has not discharged its statutory function. There can be no 'partial compliance' with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not.* Given the significance of the obligation in the context of the review process (the obligation is mandated in every case), *it is difficult to accept the proposition that a decision made despite the lack ofstrict compliance is a valid decision under the Act.* Any suggestion by the Full Federal Court in NAHV to the contrary should not be accepted. *Parliament has made the provisions of s 424A one of the centrepieces of its regime of statutory procedural fairness. Because that is so, the best view of the section is that failure to comply with it goes to the heart of the decision-making process. Consequently, a decision made after a breach of s 424A is invalid.* (Emphasis added.)

[38] The passage is crystal clear in that partial compliance with provisions in regard to compulsory acquisition of land which affects a constitutional right as it has here can never amount to full compliance of those obligations in the provisions when those obligations are there as safeguards. Everything which occurs after the breach is completely irrelevant.

[39] It will be noted that subsequent judgments of the High Court of Australia such as those in: *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627; *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489; and *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448, appeared to have overruled their own decision in SAAP. The issues in those cases seemed to be substantially the same as the ones raised

in SAAP ie formal noncompliance with mandatory statutory provisions. However, the departure from the principle in those cases was due to legislative changes in the relevant immigration legislation which now require the courts to assess in individual cases whether there had indeed been a breach of the principles of procedural fairness above and beyond simple or strict breaches of formal provisions of the statute.

[40] That said, it is my considered view that the principle in *SAAP* still stands as good law by virtue of the narrow interpretation afforded to the Code on the basis that its provisions remain to be tested against the grain of art 13(1) of the Federal Constitution. The analogy drawn from *SAAP* vis a vis the present case is therefore an apt comparison.

[41] Reverting to the facts of this case, we will have to look at the entire transaction again. The first compensation award had been pronounced, and the land thereby resumed to the state. The only logical conclusion after that is that once the resumption had happened, the entire acquisition procedure was exhausted and the government became at liberty to re-alienate the subject land.

[42] Specifically, it is worth emphasising that the appellants have exhausted the whole of their acquisition powers right from s 48 of the Code (to issue the declaration) up until s 54 (the making of the entry in the register indicating that the state has taken possession of the respondent's land). Assuming the land had been acquired lawfully (and not in the way it was in this case), the appellants would have been entitled to re-alienate the same under s 15A of the Code.

[43] For all intents and purposes therefore, the entire acquisition procedure at the first resumption process was exhausted, used up, or spent. This does not mean that the s 48 declaration had been nullified. What it means is that that the s 48 declaration was already spent in the first resumption exercise.

[44] This leads me to the registrar's powers of correction under s 136 of the Code. For ease of reference, the relevant portion of that provision reads:

> 136 Rectification of the Register
>
> (1) Subject to any rules made under section 213, the Registrar may, upon such evidence as appears to him sufficient, correct errors or omissions in any document of title or other instrument, or in the Register, and may make any entry necessary to supply any such omission, and any errors so corrected or entries so supplied shall have the like validity and effect as if such error or omission had not been made, except as regards any entry in the Register prior to the actual time of correcting that error or omission.
>
> (2) Where it appears to the satisfaction of the Registrar that —

A ...

(b) any document of title, instrument, entry or endorsement has been fraudulently or *wrongfully obtained*, or is fraudulently or wrongfully retained; ... (Emphasis added.)

B

[45] The registrar's power is an administrative power. He is therefore only at liberty to do strictly and only what the law permits him to do. His power, in the context of this case, and in my strict interpretation of the section, is only to cancel the document of title in the appellants' name (after the unlawful C resumption) and to reflect the respondent as the registered proprietor. As the s 48 declaration was spent in the unlawful resumption process, the net effect is that when the cancellation happened — and when the land reverted in the respondent's name — it did so without the s 48 declaration attached.

D

[46] Finally, one must not forget that the Code is premised on the Torrens System whereby registration to confer title to or interest in land is the heart and soul of such system. Once the land had reverted to the respondent, she became the indefeasible owner of the land and such indefeasibility can only be defeated E by what is provided in the Code. That being the case, the appellants must start the whole process all over again. To say that s 48 survives runs contrary to the very concept of a Torrens System, more particularly the indefeasible nature of the ownership of the land by the respondent. I am aware that PW7's opinion was rejected on the premise that it is for the court to decide what is the law. I F have no issue with that. But the experience of PW7 in the acquisition process should not have been brushed aside without a deep analysis of PW7's reasoning.

[47] For the reasons stated above, the position of the appellants on the G survival of the s 48 declaration is misguided.

The minister not a party to this suit

[48] Learned counsel for the appellants further argued that the respondent's H case suffers from a fatal omission in not taking out an application for judicial review against the Minister's decision to issue a s 48 notice being the genesis of the whole case. At first blush, I must say that the argument appears to possess some merit. But as one dwelled deeper into it and gave it more careful consideration, the argument misses the gist of the respondent's complaint.

I

[49] While it is true that the s 48 declaration was not challenged directly, one must not forget that the respondent's challenge is against the glaring procedural noncompliance with the provisions of the Code. The substance of the respondent's challenge is the entire resumption process and not just the s 48

declaration premised on art 13(1) of the Federal Constitution. This she is entitled to do, and I cannot imagine how the appellants may have been misled or confused by her challenge.

[50] The core of the respondent's case is not that the s 48 notice was issued wrongfully by the Minister. As already pointed out earlier, the s 48 declaration did not, in law, survive once the land reverted to the respondent via the Registrar's correction under s 136 of the Code. The effect of a successful judicial review application would be to invalidate the s 48 notice. The outcome here however is materially different and it lies in my legal finding that the s 48 notice expired upon the unlawful resumption exercise. This is attributable entirely to the appellants' own negligence.

[51] Once the appellants resumed the respondent's land, they had exercised their acquisition powers under the Code and in the process everything they did thereafter rendered the whole process void ab initio by virtue of their subsequent breaches of the mandatory provisions of the Code. And while the appellants did subsequently become the owners of the land, such ownership amounted to deprivation which was not in accordance with law. The deprivation was therefore in breach of art 13(1) of the Federal Constitution.

Motive of the respondent

[52] The learned judicial commissioner in his grounds of judgment appeared to fault the respondent's discontentment with the insufficiency of the quantum of compensation as her motivation for initiating this suit. The majority judgment also appears to embrace this attribution of fault. With respect, I am of the view that the Court of Appeal took the right approach that is, the compensation issue was actually beside the point.

[53] The substantial issue in this case is the whole acquisition process. Even if the ultimate aim of the respondent is to gain adequate compensation, and even though she ought to be taken to be aware of the s 48 declaration, that in itself is no excuse to justify a breach of the mandatory provisions of the Code. She has the constitutional right to ensure that she is not a victim of any constitutional breach of obligations by the appellants.

[54] The long and short of it all is simply that the appellants (or the government generally) do not have a freehand to flaunt the law or to only partially comply with it. The right of the respondent to hold land is a guaranteed constitutional right. And should the government choose to acquire it, then in such case, the respondent is (as is any other person) under the reasonable expectation that the law will be followed. If the law is not followed, adequate compensation shall be afforded.

[55] Further there is no question of any waiver on the part of the respondent despite of her knowledge of the acquisition process. Hers is a right guaranteed by the Federal Constitution and once that right is breached, she is entitled to the benefit of that breach. Further, the draconian effect of ss 47–48 of the Code cannot be ignored. The aforesaid sections seemingly freeze the market value of the land to the time when such declaration was made and not the time the compensation hearing actually takes place-irrespective of the amount of time which may have elapsed between the two processes. The vigilant proprietor therefore ought to have a field day insofar as glaring procedural defects are concerned. This, in my considered view provides a suitable counterbalance to the extraordinary latitude afforded to the government under the Code, and in my view, the best possible method to accord a restricted construction of the government's powers under the Code in line with settled principles of constitutional interpretation.

[56] This is what the Court of Appeal said of the appellants' noncompliance:

> [55] It is trite and we are clear that it is a fundamental right guaranteed by art 13 of the FC that no person shall be deprived of his or her property save in accordance with the law. What it means is this — that legislative, administrative and judicial action undertaken by the State against the individual is and must be objectively fair. It should not be done with the arrogance of arbitrariness or tainted with elements of unfairness or done in an excessive manner. Thus, the appellant herein has a constitutionally guaranteed right to receive a fair representation or hearing before the first respondent in the aforesaid inquiry under s 49 of the SLC before her property is resumed to the State. She must have the right to have notice of the inquiry in respect of the resumption of her land. Hence, she must be given the right to attend the said inquiry by the issuance and proper service of the notices issued under the said s 49 upon her. The appellant cannot be deprived of this right although she retained the option to waive it.
>
> [56] Clearly, the appellant's fundamental right to her property guaranteed by art 13 of the FC was violated when her appearance before the first respondent in the inquiry was denied because the notice of the said inquiry was nonchalantly served at the wrong address.
>
> [57] As we have mentioned earlier, the first respondent went further by conducting the inquiry and handing down the award in respect of the resumption of the said land in the absence of the appellant and thereafter vesting the said land to the State without the knowledge of the appellant when notice of the same under s 54(1) was not served on the appellant. Clearly, from the entire narrative of the case, the appellant was denied a fair hearing before her land was resumed to the State. Clearly too, the deprivation of the appellant's land to vest in the State was not done in accordance with law as sacrilegiously protected by art 13 of the FC. Hence, to give meaning to such constitutional protection, the said provisions must be strictly interpreted in favour of the appellant whose property is to be deprived. The provisions prescribe clear procedures to be followed by the acquiring authority in acquiring aperson's land. As such, any digression therefrom would constitute a violation of art 13 of the FC.

> [58] We are further of the considered view that the second inquiry in the second resumption exercise cannot rectify the nullity apparent in the first resumption process. This is grounded upon the fact that at all material times, the subject land was still vested in the State pursuant to the first resumption exercise and there is no evidence of its proper re-alienation to the appellant pursuant to s 13 and/or s 15A of the SLC. We have before us the appellant's unrebutted averment that the ownership of the subject land was conveniently re-registered to the appellant less than two months after the appellant, through her solicitor, had complained to the first respondent alleging their failure and negligence in not complying with the provisions of the SLC in the resumption exercise of the subject land.

[57] The foregoing paragraphs indicate that the Court of Appeal took into account all the correct considerations and principles of law. And, having read and re-read the appeal record, I have no hesitation in agreeing with the Court of Appeal's conclusion that the appellants breached art 13(1) of the Federal Constitution.

Section 29(1)(b) of the Government Proceedings Act 1959 (Act 359)

[58] Learned counsel for the appellants relied heavily on s 29(1)(b) of Act 359 to argue that the Court of Appeal had acted beyond its jurisdiction by ordering that the respondent's land be reverted to her. This argument finds favour and is embraced by the majority judgment in toto.

[59] Section 29(1)(b) of Act 359 provides as follows:

> 29 Nature of relief
>
> (1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that —
>
> (b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

[60] The complaint of the learned counsel for the appellants is this. When the Court of Appeal made a declaration that the respondent is entitled to the land and that the appellants ought to cancel the transfer under s 136 of the Code, that declaration essentially amounts to an order for the recovery of land which runs afoul s 29(1)(b) of Act 359.

[61] Again, at first blush, the aforesaid complaint appears to possess some merit. But again, with respect to learned counsel, no reference was made to cll (6) and (7) of art 162 of the Federal Constitution which provide as follows:

> 162 ...
>
> (6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.
>
> (7) In this Article 'modification' includes amendment, adaptation and repeal.

[62] Article 4(1) of the Federal Constitution is only applicable to strike down laws on grounds of inconsistency if such law was passed after Merdeka Day. The controlling mechanism for laws passed before Merdeka may be found in art 162 of the Federal Constitution. Clause (1) thereof indicates that a pre-Merdeka law shall continue to be in force until and unless the relevant authority (appointed by the Yang Di-Pertuan Agong under cll (4) and (5)), either repeals it or modifies it. In cases where the Yang Di-Pertuan Agong has not appointed anyone, or if anyone has been appointed but has not so acted, the duty to bring that law into accord with the Federal Constitution lies with the Court.

[63] The first known case to apply cll (6) and (7) of the Federal Constitution is the judgment of the Privy Council in *Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169 ('Surinder Singh Kanda'). In that case, Lord Denning noted that there was in place two conflicting bodies having the power to appoint police officers. One was the Commissioner of Police and the other the Police Service Commission. To resolve this conflict, His Lordship applied art 162(6). At p 171, Lord Denning held:

> But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, Their Lordships think it is necessary for the court to do so under art 162(6). It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. *In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service.* And that is just what has happened. The Police Service Commission has in fact made the appointments. And Their Lordships are of opinion that they were lawfully made. (Emphasis added.)

[64] The most recent case applying such modification power is the dissenting judgment of Zainun Ali FCJ in *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184 ('Kugan's case'). In that case, the estate of one Mr Kugan, who died in police custody sought exemplary damages against the government. The government argued that exemplary damages were expressly debarred by virtue of s 8(2)(a) of the Civil Law Act 1956.

[65] Now, as rightly noted by Her Ladyship, exemplary damages for a breach of a fundamental right is a part and parcel of art 5(1) of the Federal Constitution. Thus, Her Ladyship exercised her powers under art 162(6) to modify the section. This is what Her Ladyship held at paras 73 and 78–79:

> As had been alluded to above, the Civil Law Act 1956 predates the Federal Constitution. Thus it is a pre-Merdeka law or an existing law. It is clear that the section violates the right of the deceased (Kugan) in this case to have, as a matter of constitutional guarantee, an award of exemplary or aggravated damages. *Being a pre-Merdeka law and therefore an existing law that is inconsistent with a provision of the Constitution, the duty of this Court is to read it in accordance with art 162(6) of the Federal Constitution to bring it into accord with the latter …*
>
> Taking the above and acting upon the dictates of art 162(6), I would interpret sub-sub-s 8(2)(a) of the CLA as follows, to bring it into accord with the Federal Constitution. It would thus read:
>
> > Section 8(2)
> >
> > Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —
> >
> > (a) Shall not include any exemplary damages *save where the cause of action concerns the violation of a right guaranteed by the Federal Constitution*, any damages for bereavement made under subsection 7(3A), any damage for loss of expectation of life and any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death;
>
> By reading into para (a) of sub-s 8(2) the emphasised words, the section is brought into accord with the Federal Constitution.

[66] The underlined portion in the above passage constitutes Her Ladyship's amendment to s 8(2)(a) of the Civil Law Act 1956. Now, one might question how the courts may exercise what are essentially legislative powers. This very question was addressed by Gopal Sri Ram JCA in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 at p 310; [2005] 4 CLJ 169 at p 191 (which was cited with approval by Zainun Ali FCJ in *Kugan*'s case at para 75):

> How then do you modify section 12 to render it harmonious with art 13(2)? I think you do that by reading the relevant phrase in section 12 as 'the State Authority shall grant adequate compensation therefor'. By interpreting the word 'may' for 'shall' and by introducing 'adequate' before compensation, the modification is complete. *I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But hereyou have a direction by the supreme law of the Federation that such modifications as the present must be done. That is why we can resort to this extraordinary method of interpretation.* (Emphasis added.)

[67] I am fully aware that neither the appellants nor the respondent raised art 162 of the Federal Constitution during the course of argument. Be that as it may, it is my considered view that my reliance on that provision does not occasion any breach of natural justice. From the tenor of the judgments aforementioned, it is patently clear that the duty to modify the law to bring it into accord with the Federal Constitution lies with the courts (when the Yang Di-Pertuan Agong or the relevant body appointed has not done so).

[68] The duty on the courts is a mandatory one notwithstanding that art 162(6) itself stipulates that the court 'may' apply the pre-Merdeka law with such modifications. Neither the courts, nor any other body for that matter, are permitted to encourage the pervasion of a law inconsistent with the Federal Constitution. That the word 'may' is mandatory and not directory is reflected in the following passage of Suffian FCJ from *Assa Singh v Menteri Besar, Johore* [1969] 2 MLJ 30 at p 40:

> Answering the second part of the question posed, even assuming that the Enactment is inconsistent with the Constitution, I say that the Enactment is not void but that it *must be applied* with modifications to bring it into accord with the Constitution. (Emphasis added.)

[69] A further reason why I think applying art 162 here does not occasion a breach of natural justice is this. The appellants essentially argue that we cannot be permitted to act against the express prohibition in s 29(1)(b) of Act 359 even though there has been a breach of a constitutional right. Such submission, in my respectful view, goes to the extent of saying that the right to property in art 13(1) must be read subject to a statute where in this country we practice Constitutional supremacy as opposed to Parliamentary supremacy. The argument cannot therefore be correct for obvious reasons.

[70] In my considered view, the case at hand is factually no different from *Kugan*'s case. Here, the respondent was unlawfully deprived of her land. I do not consider it a sufficient answer to say that the courts, which by constitutional design exist to do justice, may be debarred from granting an order for recovery of land by a pre-Merdeka law. Prioritising the pre-Merdeka law over art 13(1) of the Federal Constitution is, in my respectful view, to

completely disregard the supremacy of our founding document. Accordingly, I would, and do, modify s 29(1)(b) of Act 359 to read as follows (amendments marked in underline):

> 29(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that —
>
> (b) in any proceedings against the Government for the recovery of land or other property the court shall not, save where the action concerns a violation of a right guaranteed by the Federal Constitution, make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

[71] With the insertion of the modifications in the underlined portion, it is therefore apparent that s 29(1)(b) no longer applies to prohibit the recovery of land where the action concerns a violation of a constitutionally guaranteed right. In this case, we are dealing with a breach of art 13(1) of the Federal Constitution, and it is my view that the said s 29(1)(b) does not prohibit this court from enforcing the respondent's right guaranteed her by art 13(1).

[72] The appellants also placed reliance on the judgment of the Privy Council in *Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors* [1986] 1 MLJ 362; [1986] CLJ Rep 33 ('Kam Gin Paik') to support the argument that s 29(1)(b) of Act 359 prohibits the court from making an order for recovery of land against the government. In that case, the Privy Council agreed with the concurrent decisions of the courts below that the acquisition process was invalid. However, in light of s 29(1)(b), the Board modified the order of the lower court ordering the recovery of land to a mere declaration that the original proprietor was entitled to the land.

[73] From my reading of the judgment, I did not notice any reference to art 162. I can only assume that it was not brought to Their Lordship's attention. It cannot be said that the Privy Council was ignorant of the existence of that art considering the first ever case to have applied it was the decision of the board itself in *Surinder Singh Kanda*. But for some reason or another, art 162 was not at all referred to in the judgment.

[74] In recent times, our courts have seen no impediment in harmonising laws (acquisition laws more specifically) with art 13(1) of the Federal Constitution. They have accordingly read the law in such a way so as to uphold the right to property, as far as permissible. The two cases that come two mind are *Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd* [2019] 1 MLJ

A 1 ('Bukit Lenang') and *Jais bin Chee & Ors v Superintendent of Lands and Surveys Kuching Division, Kuching* [2014] 6 MLJ 439; [2014] 3 CLJ 467 ('Jais Chee').

B **[75]** In *Bukit Lenang*, the Federal Court expressed the following general proposition which I find most instructive, at para 27:

> It is trite canon [sic] of interpretation that statutes which encroach upon rights, whether as regards persons or property, are subject to strict construction in the same way as penal Acts. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights and if there is any ambiguity, the construction which is in favour of the protection of the individual rights should be adopted ... (Emphasis added.)

C

D **[76]** This leads me to the *Jais Chee* decision which is a more analogous example. The facts were shortly these. The Government of Sarawak had issued a s 48 declaration to acquire some lands sometime in 1996. The s 49 notice for the compensation hearing was only issued in 2005, that is, nine years later. When the compensation hearing was ultimately held in 2005, the land was valued at its market price as at 1996 and not 2005. At the compensation hearing, the aggrieved party had in fact tendered her own expert evidence of valuation as at 2005. Land is generally an appreciating asset and thus it was no surprise that its 2005 value was markedly higher than its 1996 value.

E

F **[77]** The appellant ultimately had the issue of the inadequacy of the compensation sum referred to the High Court. Her request was essentially that she be paid the difference between the 2005 and 1996 valuation sums. The High Court declined to disturb the compensation award considering itself bound by s 60(1)(a) of the Code which stipulates that the value of the land shall be determined as at the date the s 48 notice declaration was issued.

G **[78]** Thus, a literal and pedantic interpretation of s 60(1)(a) of the Code would mean that the 1996 sum was the right one and not the 2005 one.

H **[79]** On appeal, the Court of Appeal noted that art 13(2) guarantees adequate compensation. The law generally requires that things be done with 'convenient speed'. The nine-year delay on the part of the government was unreasonable and as such, the court read s 60(1)(a) of the Code subject to art 13(2) of the Federal Constitution and not the other way around. It was on this reading that the court ascertained that the 2005 compensation sum was the I right one. The Court of Appeal therefore granted her the difference between the 2005 and 1996 amounts.

[80] Ours, as pointed out earlier, is a system which epitomises Constitutional supremacy over Parliamentary supremacy. In any event,

reverting to the facts of the present case, Act 359 is a pre-Merdeka law which means it was not, in the first place, enacted by Parliament. I am reluctant to think that Their Lordships of the Privy Council in *Kam Gin Paik* would have made the decision they did had they been referred to both art 162 of the Federal Constitution and their prior judgment in *Surinder Singh Kanda*.

[81] Thus, with the greatest of respect and deference to Their Lordships, the judgment of the board in *Kam Gin Paik*, insomuch as it decides that s 29(1)(b) debars the court from granting on order of recovery of land for a breach of a constitutional right, was a decision made in ignorance of art 162 of the Federal Constitution, and thus per incuriam and on that basis, is not liable to be followed for the proposition it purports to make.

[82] Based on the foregoing, I am constrained to grant an order in favour of the respondent ie that the appellants to rectify the register to reflect the respondent as the registered proprietor without the s 48 declaration attached. This, in my view, does not prejudice the appellants because they are at liberty to issue a fresh s 48 declaration. And, in light of the modification I have made to s 29(1)(b) of Act 359, I see no impediment to my granting such an order in favour of the respondent.

The appellants' liability in negligence, and damages

[83] The High Court dismissed the respondent's claim outright. The Court of Appeal reversed and granted her prayers for general and special damages. This order was based on the Court of Appeal's finding that there was indeed a breach of the respondent's art 13(1) rights.

[84] The majority judgment sets aside the above award on the premise that the s 48 declaration remained in force during the second resumption exercise. As I have indicated, I do not agree that it did.

[85] Therefore, there has been a clear breach of the Code on the part of the appellants and as such, a breach of a duty of care owed by them to the respondents. I therefore see no mistake on the part of the Court of Appeal in granting the respondent damages (general and special) to be assessed by the High Court. I am therefore inclined to uphold that order.

CONCLUSION

[86] This is purely a case where the appellants had failed to comply with what has been provided in the process of compulsory acquisition of land under the Code. The s 48 declaration could not have survived the s 136 cancellation. Failing to start the whole process from point zero resulted in a constitutional

breach and thus resulted in an unlawful deprivation of the respondent's property in breach of art 13(1).

[87] As for the remedy, I do not think it was quite correct for the Court of Appeal to declare that the appellants are to 're-alienate' the respondent's land to her. The second resumption was unlawful and void ab initio because it failed to comply with the strict legal requirements of the Code. 'Re-alienation' is only possible under s 15A of the Code when the resumption itself was in the first place lawful. The more appropriate order, in my respectful view, is for the title of the respondent to the subject land be reinstated.

[88] Section 29(1)(b) of Act 359 cannot operate to debar the reinstatement because it is a pre Merdeka legislation and must therefore be modified to be read subject to the Federal Constitution and not the other way around.

[89] For the purposes of completeness, I think it is pertinent to reproduce the questions of law raised in this appeal and to provide my answers to them in accordance to my analysis above. These are:

(a) whether, in an action for negligence, against the government and an officer of the government for breach of noncompliance with statutory provisions relating to inquiry and award of compensation when land is compulsorily acquired for a public purpose, a court of law has the power or jurisdiction to order that the acquired land be reinstated or re-alienated to the landowner; alternatively;

Answer: affirmative to the extent that the remedy is reinstatement and not re-alienation.

(b) whether, having regard to s 29(1)(b) of the Government Proceedings Act 1956, a court of law has the jurisdiction to order reinstatement and/or re-alienation of land acquired by government for public purpose where there has been breach of duty on the part of its officers to comply with the statutory provisions relating to inquiry and award of compensation;

Answer: affirmative to the extent that the appropriate order to be made is reinstatement.

(c) where a declaration has been made by the Minister under s 48 of the Land Code, to resume land needed for a public purpose, can the resumption process or exercise carried out pursuant thereto be fatal or unlawful and be set aside by reason only that the superintendent has failed to comply with the statutory requirements in the conduct of an inquiry to assess compensation to be paid for the acquired land even though the owner of the acquired land had not discharged the onus of providing that the award of compensation based on the market value of the land as at the date of the s 48 declaration was inadequate;

Answer: affirmative.

(d) whether an owner of land, who at the time of the purchase thereof, had declared that he/she was aware the land was already subject to a declaration made by the Minister under s 48 of the Land Code as being needed for a public purpose, is entitled to seek a declaration that the resumption process was unlawful or fatal, due to noncompliance with the procedural requirements laid down by the Land Code for assessment of compensation; and

Answer: affirmative.

(e) whether a declaration made by the Minister under s 48 of the Land Code is deemed extinguished and lapsed upon convening an inquiry under s 51 of the Land Code.

Answer: affirmative.

[90] Accordingly, I dismiss the appeal with costs in the sum of RM20,000. In view of what I have said on Court of Appeal's order to 're-alienate', I modify the order of the Court of Appeal dated 27 October 2017 and substitute it with the orders that follow. And to avoid confusion, the following shall constitute the order of the court in place of the said Court of Appeal order, that is to say:

(a) the respondent's prayers in terms of paras 19(i) and (ii) of the statement of claim dated 17 November 2015 ('SOC') are allowed, namely:

(i) a declaration that the first appellant had failed to comply with the mandatory provisions of ss 49 and 51–54 of the Sarawak Land Code in the resumption process of the said subject land, whereby such noncompliance is fatal;

(ii) a declaration that the resumption process taken by the first appellant up to the registration of the memorandum of declaration of resumption vide Instrument No L679/2012 ('first resumption') affecting the subject land whereby the subject land was resumed to the state on 12 March 2012 without any notice being given to the respondent and/or without the knowledge of the respondent is null and void and in breach of art 13(1) of the Federal Constitution;

(b) a consequential declaration that the memorandum of rectification dated 13 September 2013 which had the effect of cancelling the first resumption also had the effect of lapsing and extinguishing the s 48 declaration originally attached to the subject land as gazetted on 2 July 2009 ('the s 48 declaration');

(c) a consequential declaration that because the s 48 declaration had lapsed or extinguished, the subsequent resumption vide memorandum of declaration of Resumption Instrument No L202/2012 ('second resumption') was therefore in breach of the Sarawak Land Code and art 13(1) of the Federal Constitution. Accordingly, the second resumption was also null and void;

(d) a consequential declaration that because both the first and second resumptions were null and void, the respondent remains the lawful registered proprietor of the subject land without the s 48 declaration attached;

(e) for the removal of doubt, a declaration that the Minister is at liberty to impose a fresh s 48 declaration if the appellants remain interested to acquire the subject land on account that the earlier s 48 declaration had lapsed and extinguished;

(f) an order directing the appellants forthwith to take all necessary steps, measures and action to rectify the register so that the title of the subject land may be reinstated in the name of the respondent without the s 48 declaration attached;

(g) an order that the respondent do refund the sum of RM811,693.89 to the second appellant without interest within 30 days from the service of this order; and

(h) the respondent's prayer in terms of paras 19(iii) of the SOC is allowed, ie general and special damages to be assessed before a judge of the High Court. The matter is accordingly remitted to the High Court for assessment of damages.

Idrus Harun FCJ (delivering majority judgment of the court):

INTRODUCTION

[91] This is a judgment of this court on an appeal by Superintendent of Land and Survey Department Kuching-Divisional Office and the State Government of Sarawak, the defendants to the action, against the order of the Court of Appeal made on 27 October 2017. Before going more closely into this appeal, it is necessary to state at the outset that this judgment sets forth the majority opinion of the judicial panel of this court which is agreed to by my learned sisters Tengku Maimun Tuan Mat Chief Justice, Rohana Yusuf PCA, and Nallini Pathmanathan FCJ, having read this judgment and the conclusion reached in draft.

[92] The Court of Appeal allowed the appeal by Ratnawati bt Hasbi Mohamad Suleiman, the plaintiff to the action, setting aside in the result, the High Court order dated 29 February 2016. Shorty stated, the Court of Appeal in the aforesaid order granted a declaration that the first appellant's failure to comply with mandatory procedural provisions of ss 49 and 51–54 of the Sarawak Land Code (Cap 81) in the resumption process of the subject land taken by the first appellant up to the registration of declaration of resumption vide Instrument No L679/2012 ('the first resumption') whereby the same was resumed to the state on 12 March 2012 without any notice being given to the

respondent herein and/or without her knowledge was fatal and therefore null and void. The status quo of the subject land prior to the first resumption exercise was ordered to be reinstated and was to be re-alienated to the respondent pursuant to s 15A of the Sarawak Land Code (Cap 81). However, the minister was at liberty to impose a fresh s 48 declaration and have it *re-gazetted* if the state was still interested to acquire the subject land on account that the s 48 declaration *gazetted* on 2 July 2009 affecting the subject land was deemed extinguished and lapsed upon the convening of the first inquiry. Following the above decision, the respondent was ordered to make full repayment of the sum of RM811,693.89 to the second appellant without interest and her claim for special and general damages was allowed with interest.

FACTS

[93] For the most part, the salient facts central to this appeal which we draw from the record of appeal, are not in dispute. The subject land in question is Lot 582, Block 6, Matang Land District in the locality of 4th mile, Matang Road, Kuching, Sarawak. On 2 July 2009, the minister made a declaration under s 48 of the Sarawak Land Code (Cap 81) (the Land Code for short) vide GN2624 that the subject land was needed for a public purpose, namely, 'Proposed Flood Bypass From Sg Sarawak to Batang Salak' ('exh D3').

[94] A notice under s 49 of the Land Code dated 26 June 2009 was served on Mary Ling Moi Moi and Agatha Cheong Siew Yeng who at the material time were registered owners of the subject land for the purpose of inquiry which was fixed for 29 July 2009. However, the inquiry was postponed until further notice.

[95] On 1 August 2011 the respondent, who resided in Doha, Qatar since 2003, acquired the subject land from the above-named proprietresses by way of two memoranda of transfer (exh D10) dated 1 August 2011 which were registered at the Kuching Land Registry on 17 August 2011. The acquisition price for the subject land as stated in the said memoranda of transfer was RM1.5m. The respondent's evidence during cross-examination reveals that despite admitting that she had engaged a professional valuer for a valuation of the subject land at the time she bought the subject land, she paid this sum without knowing the market value of the land in 2009 when the s 48 declaration was made by the minister.

[96] At the time of the submission of the memoranda of transfer for registration with the Kuching Land Registry Office, the respondent simultaneously signed a declaration (exh D10) whereby she declared that she was aware of the subject land being subject to the s 48 declaration dated 2 July

2009. This declaration was signed by the respondent in the presence of her own advocate, Mohd Osman bin Ibrahim. In her testimony, the respondent also admitted that at the time she purchased the subject land, she was aware of the aforesaid s 48 declaration. She also agreed that the market value of the subject land was frozen when the said declaration was made.

[97] On 28 September 2011, the first appellant caused to be issued to the respondent a notice under s 49 of the Land Code to attend an inquiry to be held on 25 October 2011 for the purpose of determining the amount of compensation to be awarded for the acquisition of the subject land. However, the notice was mistakenly sent to the wrong address at No 366, Jalan Abang Ateh, Kuching and consequently, the respondent did not attend the inquiry on 25 October 2011 ('the first inquiry'). The undisputed evidence shows that the respondent's correct address is Lot No 336, Jalan Abang Ateh, 93400 Kuching, Sarawak. In the event, the first inquiry proceeded without the presence of the respondent.

[98] Following the first inquiry, vide Award No 293/2011 dated 21 November 2011 (exh D6), an award was made by the first appellant pursuant to s 51 of the Land Code to pay the sum of RM811,693.89 as compensation for the acquisition of the subject land. On 13 December 2011, vide a memorandum of declaration of resumption of land, Instrument L 679/2012, the subject land, together with lands acquired from 32 other registered proprietors, were thereupon resumed and taken possession of by the first appellant pursuant to s 54 of the Land Code.

[99] The respondent later discovered that the subject land had been resumed to the second appellant when her brother in law namely Dzamaluddin bin Zainuddin ('PW2') went to pay quit rent for the year 2013, but was informed by the counter staff of the first appellant that the subject land was no longer registered in the respondent's name. Complaints therefore were made by the respondent through his advocates that the resumption of the subject land to the second appellant was made without her knowledge. The first appellant then decided to remedy the mistake that resulted in the respondent not being present at the first inquiry by rectifying the land register by way of a memorandum of rectification of land register in accordance with s 136 of the Land Code in the course of which the respondent's name was thereby restored as the registered proprietress of the subject land. It is to be noted that the aforesaid memorandum states that the error was due to typographical error and that the first appellant was satisfied that the error in question had been proved to his satisfaction.

[100] Having remedied the mistake, the respondent was subsequently served with a fresh s 49 notice dated 27 September 2013 under the Land Code

to inform her of a second inquiry. On 24 October 2013, the second inquiry was held in her presence. William Ding, her lawyer, and Terrance Yap Wei Tzen, her valuer, were also present at the said inquiry. Arising from this second inquiry, the first appellant, vide Award No 420/2013 made an award on 11 November 2013 to compensate the respondent with a sum of RM811,693.89 (exh D9). This award was based upon the market value of the subject land at the date the s 48 declaration was *gazetted*. Although, in the course of the proceedings before the High Court the respondent called a professional valuer namely Henry Lu Nam Huat (PW1) as her witness, PW1 offered no evidence to dispute the market value of the subject land was RM811,693.89 as at the date of the publication of the s 48 declaration in the Sarawak Government *gazette* on 2 July 2009.

[101] On 12 November 2013, the respondent through her lawyer informed the first appellant that she accepted the award under protest and applied to the first appellant under s 56 of the Land Code to require the matter to be referred by the first appellant to the High Court for its determination on the validity and quantum of the award. The second memorandum of declaration of resumption of land affecting the subject land vide Instrument No L202/2014 by the first appellant was entered in the land register on 27 December 2013. The respondent was paid the sum awarded on 10 January 2014 and at the same time was informed by the first appellant that her application for reference to the High Court was under preparation. However, before the matter could be referred to the High Court under s 56, the respondent, on 15 September 2014, filed her claim in this action seeking to be granted:

(a) a declaration that there was a failure on the part of the first appellant to comply with the mandatory statutory procedural provisions of ss 49 and 51–54 of the Sarawak Land Code in the resumption process of the subject land and whereby such non-compliance is a fatal irregularity;

(b) a declaration that the whole resumption process taken by the first defendant right up to the registration of the memorandum of declaration of resumption whereby the subject land was resumed to the sstate on the 12 March 2012 without any notice given to the respondent and/or without her knowledge is null and void;

(c) alternatively, a declaration that the first appellant was negligent for failure to comply with the aforesaid mandatory statutory procedural provisions in causing the subject land to be resumed to the state;

(d) a declaration that the first appellant's subsequent action upon receiving complaints from the respondent had conveniently reinstated her name again in the register after the subject land had already been resumed to the state without giving any notice to or knowledge of the respondent is procedurally wrong in the law when in such a case the subject land ought to go through the statutory procedure of re-alienation and that the s 48

declaration ought to be *re-gazetted* before the first appellant can reissue to the respondent a fresh notice under s 49 dated 27 September 2013;

(e) a declaration that since the first memorandum of declaration of resumption had not been revoked, the first appellant cannot in law register another second memorandum of declaration of resumption affecting the subject land as this is amounting to duplicity of two awards being issued;

(f) a declaration that the subsequent second award issued by the first appellant on the 11 November 2013 is defective in law for reasons that the subject land was already resumed to the state on 12 March 2012 after the first award was made and by the fact that the earlier s 48 declaration affecting the subject land is already deemed to be extinguished and lapsed;

(g) a declaration that the valuation of the compensation sum of RM811,693.89 based on the s 48 declaration made in July 2009 is wrong in law as the said s 48 declaration had been earlier extinguished by the fact that the subject land had already been resumed to the State Government of Sarawak on the 12 March 2012. The valuation on the compensation should be based on a date when s 48 declaration ought to be *re-gazetted* and that the respondent ought to be compensated not less than RM1.5m based on the current market value of the subject land; and

(h) special damages in the sum of RM724,225.51 and general damages.

THE DECISION OF THE HIGH COURT

[102] The High Court dismissed the respondent's claim. We set down the main points of the reasons for the decision. The root of all these claims the learned judge found, boiled down to the unsatisfactory amount of compensation awarded to the respondent which was less than RM1.5m she paid to purchase the subject land. This could clearly be seen from the respondent's own evidence when she testified she had lost all her investment costs as a result of the alleged unlawful and negligent act committed by the first appellant. According to the learned judge, the first appellant could not be blamed for the loss of investment suffered by the respondent because she was fully aware that the subject land was subject to s 48 declaration at the time she purchased it. The respondent ought to have taken the risk when she proceeded to buy the subject land although she knew that the subject land could be acquired by the state government for public purpose and the amount of compensation to be paid in the event of such acquisition ought to be based on the market value of the subject land as at the date of the publication of the s 48 declaration as assessed by the government's valuer.

[103] It is by the respondent's own admission that the market value of the

subject land at the time the s 48 declaration was made by the minister in 2009 might not be the same as its market value in 2011. There was no evidence that the respondent had ever obtained a professional valuation of the subject land on the market value thereof as at the date of the publication of s 48 declaration when she bought the subject land in 2011. If there was any injustice, it was only caused by the respondent herself for agreeing to pay a consideration of RM1.5m which was more that the market value of the subject land without obtaining the market value of the subject land as at the date of the publication of s 48 declaration.

[104] The learned judge also held that the s 48 declaration did not only cover the subject land but a total of 152 parcels of land. The memorandum of declaration of resumption of land also showed that only 33 out of the 152 parcels of land were declared as having been taken possession of by the state government. In such a case, it was not correct that the s 48 declaration was extinguished or exhausted when the first resumption process had been completed since there were still many other parcels of land which were yet to be acquired under the same s 48 declaration. There was nothing in the Land Code which provides that s 48 declaration would lapse upon the completion of the resumption of the subject land to the state government. The said s 48 declaration was valid unless withdrawn by the minister under s 79 of the Land Code. The declaration under s 48 for the resumption of the subject land was in no way under the purview of the first appellant but the minister, who was not a party in this case.

[105] With regard to the respondent's pleaded case of the first appellant's alleged negligence, the learned judge found that it related to the first appellant's failure to ensure that the respondent was properly served with the notice of the inquiry and the subsequent award due to the wrong address used by the first appellant. Such failure to notify the respondent on the date of inquiry was not the cause for the subject land to be resumed by the state government. The issue of the resumption of the respondent's subject land pursuant to the s 48 declaration of the minister and the insufficient amount of the compensation award were the main subject matter of the complaint which must be distinguished from the issue regarding the alleged negligent act of the first appellant.

[106] The alleged negligent act of the first appellant had no direct bearing on the subject land being resumed by the state government under the s 48 declaration. In any event, the first appellant did not owe any duty of care to the respondent in regard to the decision or declaration of the minister on the resumption of the subject land by the state government and any alleged loss arising therefrom. In so far as the complaint of not being issued with the notice was concerned, the learned judge found that this was remedied by the first

A appellant when a second inquiry was held to accord the respondent the opportunity to present her case for the adequate compensation. The said inquiry was attended by the respondent together with her lawyer and a professional private valuer. An award of compensation was made by the first appellant following the second inquiry after hearing the respondent and her B lawyer. The sum awarded was paid to and duly received by the respondent under protest. The proper forum to deal with the respondent's complaint of inadequate compensation of award should be by way of a land reference to court.

C THE DECISION OF THE COURT OF APPEAL

[107] Ahmadi Asnawi JCA, giving the judgment of the Court of Appeal, found that there was complete failure on the part of the first appellant to D observe the requirement of s 49 of the Land Code when he failed to serve the s 49 notice on the respondent when the same was wrongly served elsewhere. The proper service of the said notice as procedurally provided by law was a mandatory exercise. The breach of s 49 rendered the issuance of the notice thereunder void, as a result of which the resumption proceeding by the first E appellant under ss 51, 52, 53 and 54 of the Land Code would equally suffer the same fatality and in violation of a constitutionally guaranteed right under art 13 of the Federal Constitution.

[108] As regards the second inquiry in the second resumption exercise, the F Court of Appeal held that it could not rectify the nullity apparent in the first resumption process. This was grounded on the fact that at all material times, the subject land was still vested in the state pursuant to the first resumption exercise. There was no evidence of the re-alienation of the subject land to the respondent pursuant to ss 13 and 15A of the Land Code to pass the ownership G from the state to the respondent.

[109] The second inquiry was equally smacked of illegality from the beginning when the subject land was re-registered under the respondent's title. The corresponding notices, inquiry, award, memorandum of declaration of H resumption and the eventual resumption of the subject land to the State would equally have no effect for want of legal basis.

[110] Was also decided that the notice under s 49 that was served at the wrong address constituted a breach of the duty of care. The failure to notify the I respondent of the date of inquiry and consequently further non-compliance with ss 51, 52, 53 and 54 of the Land Code was a negligent act which had caused the respondent to suffer damages, distress and deprivation of the use and enjoyment of her land and which had also put the respondent into unnecessary inconvenience and expenses. The Court of Appeal therefore

granted the order as highlighted at the beginning of this judgment.

THE APPEAL

[111] In considering this appeal, as a starting point, it is helpful to begin by highlighting the legal effects plainly arising from the declaratory orders given by the Court of Appeal. Firstly, the first resumption of the subject land by the first appellant suffers from a fatal irregularity and is null and void because of the non-compliance with s 49 and ss 51 to 54 of the Land Code which set out the process or procedure for assessment of compensation by the first appellant to be paid to the respondent on the compulsory acquisition of the subject land. Next, the status quo of the subject land prior to the first resumption has to be reinstated and hence the same has to be re-alienated to the respondent pursuant to s 15A of the Land Code. Lastly, if the minister desires the subject land for a public purpose, he is at liberty to impose a fresh s 48 declaration and have it *re-gazetted* as the earlier s 48 declaration affecting the subject land is deemed extinguished and lapsed upon convening the first inquiry.

[112] It seems clear beyond doubt that the orders made by the Court of Appeal have significantly affected the entire process of the resumption of the subject land by the first appellant which consequently culminated in the decision that the s 48 declaration is deemed extinguished and lapsed. The apparent effect of the order ultimately is to entitle the respondent to take possession of the land to which it relates. It is within this context, it may perhaps be observed, that several pertinent questions of law are raised by the appellants in accordance with s 96 of the Courts of Judicature Act 1964 which are certain to figure in this appeal. There is in fact a total of five questions of law for which leave was granted by this court. These are:

(i) whether, in an action for negligence, against the government and an officer of the government for breach or non-compliance with statutory provisions relating to inquiry and award of compensation when land is compulsorily acquired for a public purpose, a court of law has the power or jurisdiction to order that the acquired land be reinstated or re-alienated to the landowner; alternatively;

(ii) whether, having regard to s 29(1)(b) of the Government Proceedings Act 1956, a court of law has the jurisdiction to order reinstatement and/or re-alienation of land acquired by government for public purpose where there has been breach of duty on the part of its officers to comply with the statutory provisions relating to inquiry and award of compensation;

(iii) where a declaration has been made by the Minister under s 48 of the Land Code, to resume land needed for a public purpose, can the resumption process or exercise carried out pursuant thereto be fatal or unlawful and be set aside by reason only that the superintendent has failed to comply

with the statutory requirements in the conduct of an inquiry to assess compensation to be paid for the acquired land even though the owner of the acquired land had not discharged the onus of providing that the award of compensation based on the market value of the land as at the date of the s 48 declaration was inadequate;

(iv) whether an owner of land, who at the time of the purchase thereof, had declared that he/she was aware that the land was already subject to a declaration made by the minister under s 48 of the Land Code as being needed for a public purpose, is entitled to seek a declaration that the resumption process was unlawful or fatal, due to non-compliance with the procedural requirements laid down by the Land Code for assessment of compensation; and

(v) whether a declaration made by the minister under s 48 of the Land Code is deemed extinguished and lapsed upon convening an inquiry under s 57 of the Land Code.

[113] In considering the legal questions that have been raised in this appeal, we will need to look at and understand the statutory scheme or process of compulsory acquisition of land under the Land Code to which the material facts outlined above relate. It is trite to state that the various processes of compulsory acquisition of land in Sarawak is governed by Part IV of the Land Code. These processes begin with a decision of the minister that any alienated land is likely to be needed for any of the purposes specified in s 46 of the Land Code after which the land may be resumed or acquired using either a combination of ss 47–48 of the Land Code or s 48 alone. Here we would quote from the Land Code ss 47–48 in full:

Section 47 Power to enter and survey.

(1) Whenever the *Minister decides that any alienated land* or Native Customary Land or Kampung Reserve *is likely to be needed* for any of the purposes specified in section 46, *the Superintendent shall cause a public notice* of the substance of such decision to be given at convenient places in such locality, and thereupon any officer or other person either generally or specially authorized by the Minister in this behalf and his servants and workmen may enter upon such land and may survey, bore, take levels, set out and mark boundaries and do all other acts necessary to ascertain whether the land is suitable for such purpose.

(2) As soon as conveniently may be after such entry, the Superintendent shall assess the compensation for damages resulting therefrom.

(3) Such compensation shall not become payable so far as it relates to any land which is resumed under section 48 and, if paid, shall be refunded to the Government on demand by the Superintendent.

(4) If there is any dispute as to the amount of any compensation which has become payable, the persons to whom it is payable or the apportionment of the compensation, such dispute shall, if any person interested so requires, be referred to arbitration in accordance with the provisions of section 212.

Section 48 Declaration that land is required for a public purpose.

(1) Whenever it appears to the Minister that any alienated *land* or Native Customary Land or Kampung Reserve *is needed* for any of the purposes specified in section 46, the *Minister shall make a declaration* to that affect.

(2)

(a) The declaration shall state the location of the land, the particular public purpose for which it is needed, its approximate area and such other details or information as may be required to identify the land, and the place where a plan thereof, prepared by the Superintendent, could be inspected.

(b) In the case of Native Customary Land or Kampung Reserve, the declaration shall also state that any native customary rights or other rights to occupy the same under section 5, 6 or 7, shall be deemed to have been terminated on the date of the publication of the declaration in the *Gazette*, and that claims for compensation consequent upon the termination of such rights may be made in accordance with section 49.

(c) The declaration shall be published in the *Gazette* and posted on the notice board of the offices of the Superintendent and District Officer for the area where the land is located, and if it affects Native Customary Land or Kampung Reserve, the declaration shall also be published in at least one newspaper circulating in the State.

(3) Upon the posting of such declaration any entry thereof shall be made in the Register in respect of the land affected. (Emphasis added.)

[114] The way in which both ss 47–48 of the Land Code operate, its effect and the various processes by which any alienated land is acquired as authoritatively explained by the Federal Court in the case of *Superintendent of Lands & Surveys, Fifth Division*, *Superintendent of Lands & Surveys, Fifth Division, Limbang v Lim Teck Hoo & Anor* [1980] 1 MLJ 58; [1979] 1 LNS 103 is easy to comprehend. Lee Hun Hoe CJ (Borneo) on this point alluded to the relevant provisions as follows:

> Part IV of the Land Code, containing ss 45 to 83, makes provisions for the resumption of alienated land. Section 46 sets out the purpose for which land may be resumed or acquired. Under the Land Code it is possible for Government to acquire land by using either a combination of ss 47–48 or s 48 alone. Sections 47–48 enable respective notifications to be published to indicate that land 'is likely to be needed' and 'is needed'. *Both sections have the effect of freezing the value of land for the purpose*

> *of determining compensation as at the date of publication of the notification*. The use of either s 47 or s 48 would seem to depend upon whether the acquisition is a 'possibility' or a 'certainty'. Other factors, such as, urgency and size of land are relevant. In most cases, Government would use s 47 in order to enter the land, examine it and ascertain whether it is suitable for the purpose for which it is needed. If it is found to be suitable then Government would make a declaration that the land is needed for a particular public purpose under s 48. *Pursuant to s 49 the Superintendent would prepare plans for the land and cause notices to be published and deal with claims for compensation*. He would then hold an inquiry and make award under s 51. Following this, he may exercise his power under s 53 to take possession of the land. Pursuant to s 54 the Registrar would make entry in respect of such land in the register and calling on the landowners to deliver up the land title for cancellation and issue new title or titles. Section 54(4) says that 'the Superintendent shall, in cases where part only of the land has been acquired, cause to be prepared documents of title for the unacquired part or parts of the land and shall after cancellation of the existing documents of title issue such documents of title to the person entitled thereto.' If his award is not accepted the Superintendent would refer the matter to the High Court for decision. (Emphasis added.)

[115] The above explanation is further made clear when we consider the relevant passage of the judgment of Chang Min Tat FJ in the same case when His Lordship there said:

> Section 48 is however such a final act of resumption, or the first step in the final act of resumption. It operates as a declaration that the land is required for a public purpose, and upon its issuance, an entry is made in the Register. The various processes of the drawing of plans, of requiring parties to state their names and interests and of an enquiry into and award of the amount of compensation (ss 49, 50 and 51) *follow from the Superintendent taking possession of the land under s 53*. (Emphasis added.)

[116] Upon reading the relevant excerpts of the above Federal Court's judgment, the conclusion at which we are constrained to arrive is that there is in fact a two stage approach involved in the process of compulsory resumption of land under Part IV of the Land Code, namely:

(a) a decision by the minister either to issue a notification under s 47 that the land is likely to be needed for a public purpose or make a declaration under s 48 by him that the land is needed for a public purpose (the first stage); and

(b) thereafter, the Superintendent (the first appellant herein) would proceed to, inter alia, hold an inquiry to determine and award compensation (the second stage).

[117] The above approaches did not escape the learned judicial commissioner's notice when His Lordship at para [24] of the judgment

correctly said:

> [24] I agree with the defendants' submission that as a superintendent, the first defendant's duty only commences after the declaration by the Minister under s 48 of the Land Code.

[118] Having briefly outlined the law as we understand it, we now turn to consider the questions of law posed by the appellants in this appeal. We shall first deal with questions (i) and (ii) together as there are clear links between both questions. This will in turn be followed with our deliberations on questions (iii)–(v) which, for the same reason, will also be considered together.

[119] Before us, the first two leave questions are taken on jurisdiction which concerns the extent to which the court may make an order in any proceedings against the government for the recovery of land by reason of s 29 of the Government Proceedings Act 1959 (Act 359). For the appellants, it is submitted that the relief granted by the Court of Appeal amounts to reinstatement and re-alienation of the subject land. Such relief, according to learned state legal counsel, is wrong in law and legally unsustainable the reason principally being that the court has no jurisdiction to grant the order for recovery of land against the government because of s 29(1)(b) of Act 359.

[120] Mr William Ding, submitting on behalf of the respondent disagrees with the above submission. He argues that the Court of Appeal is right to have made the declaratory order that the first appellant fails to comply with mandatory provisions of ss 49 and 51–54 of the Land Code in the resumption process of the subject land. Such non-compliance, according to learned counsel, is fatal. The Privy Council's decision in *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v Kam Gin Paik & Ors* [1986] 1 MLJ 362; [1986] CLJ Rep 33 is distinguishable. It is further submitted that the principal issue before the Privy Council was whether the Federal Court was correct in affirming the decision of the High Court that the long delay between the publication of a declaration under s 8 of the Land Acquisition Act 1960 in GN 89 and the inquiry into compensation vitiated the appellant's award and rendered it a nullity. In the instant appeal, the respondent was seeking various declaratory orders on the ground of non-compliance with the aforesaid provisions and the respondent was also claiming for special and general damages premised on negligence. It has also been urged upon us to consider that the Court of Appeal did not make a direct order for the appellant to deliver the subject land to the respondent. Indeed, it made an indirect order in declaring that the respondent was entitled to possession of the subject land. As it was, learned counsel very sensibly submits, if the declaratory order made by the Court of Appeal in directing the re-alienation of the subject land to the respondent is erroneous, the said declaratory order may be varied to the effect that the respondent is entitled as against the appellants to possession of the subject land. The parties

A have had a fair opportunity to address their arguments on this issue. Needless to say, for our part being the ultimate court of appeal, what then we need to do is to confine our deliberations to these submissions, the case or issues put forth before us and we do not propose to venture or travel beyond it.

B **[121]** There is admittedly much attraction in the argument urged for the appellants, and if there is any real substance in these arguments, it would follow that the Court of Appeal was wrong in making the order it did in this section. The order in question is stated to the effect that the subject land is to be reinstated and re-alienated to the respondent by reason of non-compliance C with statutory provisions governing inquiry or award of compensation for the land acquired for public purpose. It is clear, in our view, that such order of reinstatement and re-alienation of the subject land to the respondent is akin to an order for recovery of land made against the second appellant which the court is not entitled to grant under s 29(1)(b) of Act 359. The reasoning of the Court D of Appeal for the conclusion reached by it in the granting of the declaratory order of reinstatement and re-alienation of the subject land can be gleaned from paras [58]–[62] and [65]–[66] of the judgment. Simply put, based on these paragraphs the Court of Appeal allowed the declaratory orders in favour E of the respondent and directed that the subject land to be reinstated on a status quo basis or reverted to its original position prior to the first resumption exercise.

[122] Section 29(1)(b) of Act 359 is a plain provision in express terms on a F prohibition imposed on the court from granting any order for recovery of land against the government. It is expressed in peremptory language as follows:

> 29(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give appropriate relief as the case G may require:
>
> Provided that —
>
> (a) ...
>
> (b) in any proceedings against the Government for *the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property*, but may in lieu thereof make an order declaring H that the plaintiff is entitled as against the Government to the land or property. (Emphasis added.)

I **[123]** What is important to note is that the order made by the Court of Appeal goes to the extent of making it explicit that the subject land be reinstated to the respondent or that the subject land be re-alienated to the respondent under s 13 or 15A of the Land Code. It leaves no room for doubt that the order is intended to ensure that the subject land is reinstated or restored

to the ownership of the respondent and require the minister to *re-gazette* a fresh s 48 declaration if the second appellant still needs the subject land for the public purpose. One thing which is very clear is that the immediate effect of the order is to entitle the respondent to take possession of and recover from the government the subject land leaving it with absolutely no choice but to comply with it. We see nothing in this order to entitle us to come to a different conclusion. It is indeed pointless for the Court of Appeal to make the order in question when it has no power to make the order in the nature of the recovery of the subject land as against the government because s 29(1)(b) of Act 359 prohibits such order being so made against the government whose servant the first appellant is. The order cannot therefore be allowed to stand.

[124] To set the context, Lord Keith of Kinkel who delivered the judgment of the Pricy Council in the case of *Pemungut Hasil Tanah, Daerah Barat Daya, Penang*, alluded to s 29(1)(b) of Act 359 and proceeded to hold that the said section precludes an order being made against the government for the recovery of the land. In the above case, the Penang State Authority, on 30 March 1972 published in the *gazette* under s 8 of the Land Acquisition Act 1960 a declaration (GN89) that certain lands including some in the ownership of the respondent were needed for public purposes. The appellant held an inquiry under s 10(1) of the Act in 1976, seven years after the publication of the aforesaid publication of the declaration in 1972. The appellant issued an award to the respondents. Subsequently, leave of the High Court to apply for certiorari to quash the appellant's award was obtained by the respondents. The respondents later made application for certiorari in relation to alleged contravention of the natural justice in the appellant's conduct of the inquiry leading to the award and also in relation to whether the delay of seven years in the holding of the inquiry had the effect of invalidating the award. The High Court, inter alia, quashed the declaration in GN89 and all subsequent proceedings including the inquiry and the award and declared that any acquisition or taking possession by the appellant of the respondent's land was null and void. Consequently the appellant was directed by the High Court to deliver back to the respondent's possession of any of their lands which the appellant had taken. The Federal Court allowed the appeal in part (see *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau) Pulau Pinang v Kam Gin Paik & Ors* [1983] 2 MLJ 390). With regard to s 29(1)(b) of Act 359, the Federal Court held that the High Court had no power to make an order against the appellant for delivery up of possession of the respondents' land, and accordingly set aside that part of the High Court's order. At p 395 of the report, the Federal Court succinctly said:

> Having regard to the express provisions of s 29(1)(b) of the Government Proceedings Ordinance, 1956 can the court at all make an order of repossessions of the lands against the Government? ... s 29(1)(a) was also examined in *Ramamoorthy v Menteri Besar Selangor & Anor* [1971] 1 MLJ 187 and Gill FJ as then was, said

A that the provisions of s 29 are 'sufficiently clear so as to leave no room for argument'. ... *the special position of the Government is nevertheless maintained and the power of the court to grant relief against the Government is expressly restricted.* In the preliminary note of *Halsbury' Statute* Vol 6 the following note explains the position of the Crown in all civil proceedings as provided by s 21 of the Crown Proceedings Act, 1947 of the United Kingdom which is in pari materia with s 29 of our Government Proceedings Ordinance, 1956:

> No relief by way of injunction or order of specific performance may be given against the Crown or an officer of the Crown if the effect would be to bind the Crown, but instead an order declaratory of the rights of the parties must be made. Not order may be made against the Crown for the recovery of land or the delivery of property, but instead any order must declare that as against the Crown the plaintiff is entitled to the land or property. (Emphasis added.)

[125] The Privy Council held that the High Court and the Federal Court were correct in holding that the inquiry and subsequent award were invalid and should be set aside. Hence, the appellant was not entitled to take possession of the respondents' land under the Act and the appellant was under a duty to restore possession to the respondents. However, the Privy Council agreed with the Federal Court that under s 29(1)(b) of Act 359 the High Court had no power to direct the appellant to deliver back the subject land to the respondents. It was further held that the Federal Court should have gone on to make an order in terms of s 29(1)(b) of Act 359 declaring that the respondents were entitled as against the appellant to possession of the land. Lord Keith of Kinkel, whilst referring to the Federal Court's decision at p 37 of the report noted that:

> They also held that having regard to s 29(1)(b) of the Government Proceedings Ordinance 1956, the trial Judge had no power to make order against the appellant for delivery up of possession of the respondent's lands, and accordingly set aside that part of his order. In other respects the Federal Court dismissed the appeal.

At p 39 His Lordship proceeded to hold that:

> ... Their Lordships agree with the Federal Court that s 29(1)(b) of the Government Proceedings Ordinance 1956 precludes an order being made against the Government whose servant the appellant is, for the recovery of the land. So the Federal Court rightly set aside that part of the order of the learned trial Judge which ordered the appellant to deliver possession of the lands back to the respondents. What the Federal Court should, however, have gone on to do was to make an order, in terms of s 29(1)(b), declaring that the respondents were entitled as against the appellant to possession of the land.

[126] The above Privy Council's decision manifestly shows that the Court of Appeal is bereft of any power to make the order as it did. The order is not only bad, it is in law a nullity. It thus cannot be expected to stay. For all these reasons,

we see nothing wrong in the submission made on behalf of the appellants. We think the point is well taken and is supported by law and authority. Accordingly, the order made by the Court of Appeal is set aside. The result is therefore that both questions (i) and (ii) are answered in the negative.

[127] We would say, though, that the question of whether we have to go on to make an order in terms of s 29(1)(b) of Act 359 declaring that the respondent is entitled as against the appellants to possession of the subject land, we think that the answer to that question hinges on the outcome of our deliberations on questions (iii)–(v). Accordingly we shall reserve our answer until the end of our deliberations on these three questions of law.

[128] Questions (iii), (iv) and (v) are framed on the basis that the respondent founded her action on the tort of negligence arising from the failure by the first appellant to serve the notice of inquiry on the respondent when it was mistakenly served at a wrong address thereby depriving her of the opportunity to state her claims and objections before any valid award could be given by the first appellant. It is important to bear in mind that the alleged negligent act was committed at the second stage of the resumption process which concerns only the assessment of the award of compensation to be paid to the respondent.

[129] Drawing all these questions together, we set down the arguments taken before us for the respondent in summary. Firstly, according to learned counsel, question (iii) is of no issue before this court because the issue before the courts below is not a land reference matter relating to the inadequacy of award pursuant to s 56(i) of the Land Code. The issue in the appeal herein relates to the alleged wrongful declaration and resumption of the subject land without the respondent's knowledge due to the error committed when the subject land was earlier resumed. Secondly, as regards question (iv), the respondent's cause of action is not about challenging the minister's s 48 declaration affecting the subject land but the manner in which the appellants resumed the subject land without any notice or knowledge of the respondent. Thirdly, it is the respondent's position that once the land acquisition process is completed, the registration of the subject land as state land is final and conclusive and as such the s 48 declaration has been done with, extinguished, lapsed and exhausted.

[130] To evaluate the above rival contentions on these questions we consider that it is necessary to set out the facts material to these questions in their proper perspective. A pertinent point to emphasise is that the minister is only involved in the first stage of the resumption process. The minister, as the record shows, is not a party to the proceedings herein. The evidence which can be gleaned from the scrutiny of the record of appeal reveals the undisputed fact that the s 48 declaration has never been challenged by the respondent in this action. It

is also noteworthy that no order is sought by the respondent in her statement of claim against the said s 48 declaration that the subject land is needed for public purpose or to nullify it. It seems to be the case that the respondent merely alleges without any supporting legal authority that the declaration is deemed to have lapsed or extinguished after the first inquiry was carried out for which, it should be noted, the Court of Appeal agreed and accordingly declared to the like effect. The declaration does not only affect the subject land but also, as found by the High Court, a total of 152 parcels of land needed for the purpose of a flood bypass channel in the Kuching area, as part of the flood mitigation scheme for the city. It is important to realise that the respondent never applied for judicial review to set aside the said ministerial declaration affecting the subject land. The Court of Appeal too, in allowing the respondent's appeal, did not act on its own initiative to grant any affirmative order to nullify or quash the declaration.

[131] The general principle of law relating to land acquisition under the Land Code is that both ss 47–48, read together with s 60(1)(a) of the Land Code, have the effect of freezing the value of land for the purpose of determining compensation as at the date of publication of the notification under either s 47 or s 48. We derive support for this proposition from the decision of the apex court in *Superintendent of Lands & Surveys, Fifth Division, Limbang v Lim Teck Hoo & Anor*, which we highlighted earlier. Having regard to the material facts, the respondent who had the benefit of independent legal advice admitted during cross-examination (to which there was no re-examination) that she knew at the time when she acquired the subject land on 1 August 2011, the same had been declared under s 48 of the Land Code as needed for public purpose and that the price of the subject land had been frozen when the s 48 declaration was *gazetted* on 2 July 2009. She reportedly paid RM1.5m for the subject land without knowing its market value in the year 2009 when the said declaration was made by the minister. When cross-examined, she admitted that the s 48 declaration was still in force at the time of the second inquiry in 2013 and was not at any time quashed by any court of competent jurisdiction. This evidence gives rise to a point of some significance concerning which the legal position of the s 48 declaration is called into question.

[132] In *Penang Development Corporation v Teoh Eng Huat & Anor* [1993] 2 MLJ 97; [1993] 2 CLJ 283 Jemuri Serjan CJ (Borneo) in explaining the legal position on this point cited foreign authorities to state the pertinent law to support the proposition that an act or a statutory instrument is effective and capable of legal consequence unless the necessary proceedings are taken at law to establish its invalidity:

> Lord Diplock in the case of *F Hoffman-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295 at p 365 had this to say:

> Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party *or brought by a party whose interests are affected by the law so declared sufficiently directly* to give him locus standi to initiate proceedings to challenge the validity of the instrument ...

Lord Radcliffe made observations to the same effect in the case of *Smith v East Elloe Rural District Council* [1956] AC 736 at p 769 where he said:

> At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that, consequently, all references to compulsory purchase orders in paragraphs 15 and 16 must be treated as references to such orders only as had been made in good faith. But this argument is in reality a play on the meaning of the word nullity. *An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders* ... (Emphasis added.)

[133] The same principle also applies with equal force to land instruments registered in the Land Register. Thus, Haidar bin Mohd Noor J in *Tan Tock Kwee & Anor v Tey Siew Cha & Anor* [1995] MLJU 408; [1995] 4 CLJ 658 at p 659 held:

> [6] The instruments by which the charges were registered are merely voidable and not void and *will remain so until they are declared* void by a Court of law. (Emphasis added.)

We think it is legitimate to state that, based on our analysis of the evidence shown above and applying the above pronouncements, it is abundantly clear that since the respondent did not pray for any order or seek any declaration that the s 48 declaration is illegal or invalid and that the Court of Appeal did not grant any affirmative order to nullify or quash that declaration, it follows that the said declaration remains in full force, valid and effective and the subject land is needed for a public purpose. Accordingly, there is clearly no legal basis for the Court of Appeal to order that the subject land is to be reinstated and re-alienated to the respondent and the minister may *re-gazette* the subject land as needed for a public purpose if the government intends to proceed with the compulsory acquisition thereof.

[134] But nevertheless, we should note that much has been said by the Court of Appeal and ultimately it makes a finding that the s 48 declaration dated 2 July 2009 affecting the subject land was deemed extinguished and lapsed upon the convening of the first inquiry, which inquiry the Court of Appeal

held, did not comply with the mandatory procedural provisions of the Land Code and such non-compliance was a fatal irregularity. We must necessarily highlight that there has been an attempt by the respondent on this point during examination-in-chief of her expert witness namely PW1 to suggest that the s 48 declaration had extinguished upon the completion of the resumption exercise to which PW1 answered that it was extinguished, lapsed and exhausted. However, in our judgment, this is merely an opinion on an issue of law which is glaringly unsupported by any law or authority, given by PW1 who, by his own admission, is not legally qualified to do so. He is a professional valuer. We cannot therefore accept this opinion as stating the correct legal position under the Land Code. It is important to emphasise that our rejection of this evidence is not made purely on this basis alone for ultimately it is the law that must be considered. The force of the point can be seen when we peruse through the provisions concerning the scheme of compulsory acquisition of land in Part IV of the Land Code which without doubt does not provide for a declaration made under s 48 to become lapsed or extinguished upon completion of a resumption process of any land acquired under the said Part.

[135] On the contrary, the power to withdraw any land from the resumption process is vested with the minister by virtue of s 16 of the Sarawak Interpretation Ordinance 2005 (Cap 61) which empowers the minister to withdraw the s 48 declaration. Even so, there is no order made by the Court of Appeal to compel the minister to withdraw the subject land from acquisition under Part IV of the Land Code. The minister on his part did not withdraw the s 48 declaration either. Now, let us refer to s 16 of the Sarawak Interpretation Ordinance which provides as follows:

> 16 Whenever by or under any written law power is given to the Majlis Mesyuarat Kerajaan Negeri, the Yang di-Pertua Negeri or a public officer or body or authority (in this section referred to as 'the authority empowered') to make subsidiary legislation or to make, issue or approve any order, Proclamation, instrument, *declaration*, direction, instruction, notification, register or list, it shall include the power of amending or suspending that subsidiary legislation, order, Proclamation, instrument, *declaration*, direction, instruction, notification, register or list, or *withdrawing* its approval, in the same manner as it was made or issued ... (Emphasis added.)

[136] Section 16 of the Sarawak Interpretation Ordinance, is indeed a plain manifestation in express terms that the power of the minister to make a declaration under s 48 of the Land Code includes the power to amend, withdraw or suspend the declaration. Accordingly, absent any express provision in the Land Code that a declaration under s 48 is extinguished or lapsed upon the completion of the resumption of the acquired land, the s 48 declaration cannot, by implication or assumption, simply become exhausted or distinguished when the resumption of the subject land had been completed.

There is indeed absolutely nothing in the Land Code to indicate, or permit this Court to say that there is a clear implication of an intention contrary to our above finding. We cannot accept the finding made by the Court of Appeal and reject the argument of learned counsel for the respondent on this point which we cannot otherwise apprehend, as they are patently posited on its misapprehension or erroneous assumption of the law and fact. The declaration has to be withdrawn by the minister before the subject land could be returned to the condition that existed prior to the s 48 declaration. Until it is so withdrawn or declared to be invalid, the declaration remains in full force and effect.

[137] We should also note that the Court of Appeal, at para [63] of the judgment, agrees that the first appellant 'did not cause the resumption of the subject land to the state. It was a ministerial decision made for a public purpose'. To rephrase this finding of the Court of Appeal, the first appellant was not the cause of the subject land being resumed by the Government. It was the minister who made the decision that the subject land be resumed. As such, the negligence of the first appellant as alleged by the respondent was not the cause of the subject land being compulsorily acquired by the government. In other words, the alleged negligence of the first appellant in the process of assessing compensation in the second stage of the resumption process could not nullify and should not be declared by the court in a manner that would affect the decision made by the minister at the first stage of the process to declare the subject land is needed for a public purpose and therefore may be resumed under Part IV of the Land Code. The procedural provisions in ss 49 and 51–54 of the Land Code relate to the process at the second stage in the determination of compensation for the subject land and the resumption thereof after an award of compensation has been made. The alleged 'error' committed by the first appellant, if any, only affects the quantum of compensation to be paid but these provisions do not affect the minister's decision to resume the subject land under s 48 of the Land Code.

[138] It is decided by the Court of Appeal that the resumption exercise of the subject land was unlawful and in violation of art 13 of the Federal Constitution (see paras 53 and 55–57 of the judgment). In our view, no one, not even this court in this regard can dispute that right to property is guaranteed by and firmly entrenched in the Federal Constitution. In fact, art 13 has ordained in cl (1) that no person shall be deprived of property save in accordance with the law, and in cl (2) that no law shall provide for the compulsory acquisition or use of property without adequate compensation. It is pertinent to observe that although the Court of Appeal's decision does not specify which clause of art 13 applies to this case, given the tone and tenor of its reasoning, it seems to us that the relevant provision applicable to this case is cl (1). In fact, the resumption of

A the subject land, the Court of Appeal held, was not carried out in accordance with the law.

B **[139]** David Wong Dak Wah JCA (as His Lordship then was) in considering the meaning to be ascribed to the expression 'adequate compensation' construed it with concise use and clarity of words when His Lordship said in *Jais bin Chee & Ors v Superintendent of Lands and Surveys Kuching Division, Kuching* [2014] 6 MLJ 439; [2014] 3 CLJ 467 at p 479 that '[T]he words 'adequate compensation' must be given their proper interpretation. The word 'adequate' can only mean what is fair and reasonable compensation ...'. The force and relevancy of this construction can be seen in the provisions of s 60 of the Land Code which provides:

C

Section 60 Matters to be considered in determining compensation.

D (1) In determining the amount of compensation to be awarded for land resumed under this Part or for the termination of rights lawfully created over such land the Court shall take into consideration the following matters and no others —

(a) the *market value* of the date of the publication of notification under section 47 or, if no such notification has been published, *the market value at the date of the posting of the declaration made under section 48';*

E

(b) any increase in the value of the other land of the person interested likely to accrue from the use to which the land resumed will be put;

(c) the damage, if any, sustained by the person interested, at the time of the Superintendent's taking possession of the land, by reason of severing such land from his other land;

F

(d) the damage, if any, sustained by the person interested, at the time of the Superintendent's taking possession of the land, by reason of the resumption injuriously affecting his other property, whether movable or immovable, in any other manner or his actual earnings;

G

(e) if in consequence of the resumption he is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change;

(f) any improvement to the land made with the prior consent of the Superintendent after the publication of the notification under section 47(1) or the posting of the declaration under section 48(2), whichever is the date in respect of which the market value is taken in accordance with the provisions of paragraph (a); and

H

(g) in the case where rights over Native Customary Land or Kampung Reserve have been terminated, any agreement by the Government to resettle or relocate the persons affected to any other land or buildings, if any, provided by the Government, and at any costs of resettlements or relocation which the Government has agreed to bear and pay.

I

(2) For the purposes of subsection (1)(a) —

(a) if the market value has been increased by means of any improvement made by the, proprietor or persons in occupation of the land or his predecessor interest within two years before the notification was published under section 47(1) or, if no such notification was published, within two years before the declaration under section 48 was published, such increase shall be disregarded unless it be proved that the improvement was made in good faith and not in contemplation of proceedings for resumption of the land being taken under this Part:

(b) when the value of the land is increased by reason of the use thereof, or of any premises thereon, in a manner which could be restrained by any Court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account.

(c) the market value of the land resumed shall be deemed not to exceed the price which a *bona fide* purchaser might reasonably be expected to pay for the land on the basis of its existing use or in anticipation of the continued use of the land —

(i) for the purpose stipulated in the document of title for the land; or

(ii) having regard to category of land use endorsed on the document of title for the land under section 13(1)(d); or

(iii) in conformity with any conditions or requirements imposed by the State Planning Authority under Part X regarding the use of the land;

whichever is the lower category of use; and no account shall be taken of any potential value of the land for any other higher or more intensive use. (Emphasis added.)

[140] The words 'shall' and 'no others' appearing in the chapeau of s 60 of the Land Code plainly show in express and unmistakable terms that it is peremptory in nature. Section 60 thus makes it mandatory for the court to give effect to the provision in considering the adequate amount of compensation to be awarded (see the Court of Appeal decision in *Superintendent of Lands & Surveys Samarahan Division v Surianto Abdul Hamid & Anor* [2016] 3 CLJ 591 at para [26]). We accept the decision of the Court of Appeal in the above case that s 60 of the Land Code as it stands is not violative of art 13 of the Federal Constitution. It is not being challenged in this appeal that Part IV of the Land Code which includes s 60 is unconstitutional and repugnant to the Federal Constitution. In fact we would go so far as to say that s 60 is the law envisaged by art 13 that allows a person such as the respondent to be deprived of her property as long as she is so deprived in accordance with that law which in actuality requires the court to consider various matters prescribed therein in order to ensure that the respondent shall be adequately compensated for the compulsory acquisition of the subject land.

[141] In this case, s 60 of the Land Code meets the constitutional standards

of an expropriatory law laid down by art 13 of the Federal Constitution. Since there is no s 47 notification in respect of the subject land in this action, in terms of s 60, the award of compensation was based on the market value of the subject land as at the date of the s 48 declaration. The first appellant obviously acted in accordance with the provisions of s 60 of the Land Code.

[142] What is important to note is that in the light of the correct legal principle that is applicable to this appeal as laid down by the Supreme Court in *Superintendent of Land & Surveys, Fifth Division, Limbang v Lim Teck Hoo & Anor*, as discussed earlier, both ss 47–48, as the case may be, read with s 60 of the Land Code, and in particular para (1)(a) thereof, have the effect of freezing the value of the land as at the date of the publication of the declaration pursuant to s 48. Based on s 60(1)(a) of the Land Code, in determining the amount of compensation to be awarded to the subject land, its market value shall be the market value as at the date of the publication of the declaration made under s 48 of the Land Code. The court has to take into consideration the market value of the subject land in accordance with the above statutory formulation (see *Buan Joong Sdn Bhd v Superintendent of Lands & Surveys Kuching Division* [2005] 5 MLJ 404; [2005] 2 CLJ 910). In this case, the award was based on the market value of the subject land as at the date of the s 48 declaration. This is very clearly stated in the valuation report tendered by the appellants. The valuation was not challenged by the respondent. Although the respondent called PW1, a professional valuer, to testify, he did not provide any valuation of the subject land as at 2 July 2009. The learned judicial commissioner found for a fact that there was no evidence adduced by the respondent that the first appellant's valuation of the market value of the subject land as at the date of the s 48 declaration was incorrect or inadequate (paras 20–21 of the grounds of judgment). It is clear, and as rightly submitted by learned state legal counsel, that although the Court of Appeal reversed the decision of the High Court, this finding of fact made by the High Court based on the evidence was not overturned by the Court of Appeal.

[143] Hence, the acquisition of the subject land was made in accordance with art 13 of the Federal Constitution. The conclusion that follows is that the award of RM811,693.89 as compensation for the acquisition of the subject land must be 'adequate compensation' for the acquisition of the subject land and there is no infringement of art 13 of the Federal Constitution. It is to be observed that the respondent founded her case upon the alleged negligence of the first appellant who failed to serve the notice of inquiry on her, having sent the same to a wrong address. Consequently, the respondent was not present at the first inquiry held under s 51 of the Land Code. This is made clear by the passage of the written judgment of the Court of Appeal in para 34. However, the appellants came to the court with irrefragable proof to show that the respondent was heard at the second inquiry when she was represented by her

lawyer and her professional valuer. In this respect, the learned trial judge made the following finding which we accept in our judgment:

> [27] In so far as the complaint of not being issued with the notice is concerned, *this was remedied by the first defendant when a second inquiry was held to accord the plaintiff to present her case for adequate compensation. The said inquiry was attended by the plaintiff together with her lawyer and a professional private valuer. An award of compensation was made by the first defendant following the inquiry after hearing from the plaintiff and her lawyer. The sum awarded was paid to and duly received by the plaintiff under protest.* (Emphasis added.)

[144] In view of the above finding of fact made by the High Court, the Court of Appeal manifestly misdirected itself in this fundamental aspect when it finds that the first appellant violated the respondent's right to be heard at the inquiry to determine damages. Such finding is unsustainable and without any basis.

[145] The reasoning of the Court of Appeal for the conclusion reached is expressed in the following para [55] of its written judgment:

> [55] It is trite and we are clear that it is a fundamental right guaranteed by art 13 of the FC that no person shall be deprived of his or her property save in accordance with the law. What it means is this — that legislative, administrative and judicial action undertaken by the State against the individual must be objectively fair. *It should not be done with the arrogance of arbitrariness or tainted with elements of unfairness or done in an excessive manner*. (Emphasis added.)

Whilst the Court of Appeal is quite correct to state the constitutional position in art 13 that no person shall be deprived of his or her property save in accordance with law, we express the view that the Court of Appeal's reasoning to which we have just referred is plainly a fallacy particularly when it falsely implies that the first appellant had acted with arrogance of arbitrariness or in an excessive manner. What was established in the course of the trial was that the notice under s 49 of the Land Code was mistakenly sent to the wrong address which resulted in the respondent not being present at the first inquiry. The subsequent award was also sent to the wrong address. When the error became known, the first appellant sought firstly, to remedy the mistake rectifying the land registry by way of a memorandum of rectification of land register pursuant to s 136 of the Land Code so that the respondent's name was restored as the registered owner of the subject land and secondly, to hold another inquiry to enable the respondent and her advisors to be present. The memorandum of rectification states very clearly that the mistake is due to typo-graphical error clearly suggesting that this genuine mistake was not intentional or due to negligence. We have formed a very clear view that there is in reality not a scrap of evidence to show that the mistake was deliberately caused to deprive the respondent of an opportunity from being heard at the first inquiry. There was

A therefore no such thing as the respondent being deprived of her property not in accordance with the law or being compensated inadequately for the acquisition of the subject land.

B **[146]** It is not difficult to see the real reason for the respondent's protestation over the error made by the first appellant during the second stage of the resumption process, resulting in her absence during the first inquiry. In her evidence, the respondent agreed to the suggestion put to her that she was not satisfied with the compensation paid to her when it was lower than the price she had paid when she purchased the land in 2011. She also agreed to a suggestion C that she wanted the subject land to be re-alienated so that a fresh s 48 declaration could be issued to enable the market value of the subject land to be based on the current market value, not the value in 2009. This evidence corresponds and agree almost exactly with one of the relief sought by the respondent in para 7 of the statement of claim which is that the valuation of the D subject land should be based on a date a fresh s 48 declaration ought to be *re-gazetted* and that she ought to be compensated not less than RM1.5m. It is also consistent with the finding made by the learned trial judge that the root of all these claims boiled down to the unsatisfactory amount of compensation awarded to the respondent which was less than RM1.5m she paid to purchase E the subject land. We apprehend, by ordering that the subject land should be reinstated and re-alienated to the respondent and that the minister is at liberty to impose a fresh s 48 declaration, the Court of Appeal has in effect allowed the above relief sought by the respondent although it dismissed the aforesaid finding made by the High Court as being a subsidiary issue.

F **[147]** Drawing all these reasons together, in our respectful opinion, the alleged non-compliance with procedural statutory provisions relating to assessment of compensation for the acquisition of the subject land was not a G fatal irregularity since compensation was based on the date of the s 48 declaration and therefore the respondent did not suffer any loss as a result of the alleged procedural lapse. The award that was made indisputably reflected the market value of the subject land as at the date of the s 48 declaration in compliance with s 60(1)(a) of the Land Code. On such evidence, no monetary H loss would have been sustained by the respondent. In these circumstances, there is no basis for the resumption of the subject land to be invalidated and deemed to have lapsed or extinguished, and that the ownership of the land ought to be reinstated or re-alienated to the respondent.

I **[148]** The respondent is seeking various declaratory remedies. It is undoubtedly the law that declaration is a discretionary remedy. It is stated by the learned authors Zamir & Woolf in *The Declaratory Judgment* (3rd Ed) at p 123 that:

> A most important feature of the declaratory judgment is that it is a flexible and

discretionary remedy. This helps to explain its increasing popularity with litigants and judges *both in the private and public law fields*. Its flexible and discretionary nature enables the court to exercise precise control over the circumstances and terms in which relief is granted. *Although a claimant or an applicant may have proved his case, he still has to persuade the court both that it should in its discretion make a declaratory judgment* and, if it does, that the terms he seeks *are appropriate*. (Emphasis added.)

We need only say on this point that in Malaysia, the courts have held that such discretionary remedies like declaration or certiorari would only be granted where substantial injustice has occurred or resulted from any wrongful act by the government or its officers. It is also settled in our law that the courts should not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion substantial injustice. The law as explained in *Ngu Toh Tung & Ors v Superintendent of Lands & Surveys, Kuching Division, Kuching & Anor* [2006] 1 MLJ 142 at pp 147–148 is as follows:

[12] ... But it is not. If you look carefully enough at those cases where the remedy was granted, you will find that they concerned applicants who had suffered or were likely to suffer a substantial injustice in consequence of a breach of law. In my considered judgment, the correct approach to public law remedies is that stated by Bose J in *Sangram Singh v Election Tribunal* AIR 1955 SC 425 at p 429:

> That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that *they will not exercise jurisdiction in this class of case unless substantial injustice has ensued*, or is likely, to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.

[149] In fact, the Federal Court in *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234; [1980] 1 LNS 150 whilst taking the line that the court had the power to grant declaration in order to prevent an injustice to the plaintiff added a warning note to the exercise of the power to grant a declaration that its use must not be carried too far. Instead the power to grant declaratory judgment in lieu of the prerogative orders or statutory relief must be exercised with caution, it must be exercised sparingly, with great care and jealousy with proper sense of responsibility and after a full realisation that judicial pronouncements ought not to be issued unless there were circumstances that properly called for their making.

[150] In dealing with these three questions, the following finding of fact by the High Court which was never disapproved nor dissented upon by the Court of Appeal ought to be taken into account:

> [19] In my view, the first defendant could not be blamed for the loss of investment suffered by the plaintiff because as rightly pointed out by the counsel for the defendants, the plaintiff *is fully aware that the land in question is subject to s 48 at the time when she purchased it*. What this means is that the plaintiff ought to have taken the risk when she proceeded to buy the subject land *although she knew that the subject land could be acquired by the state government for public purpose and the amount of compensation to be paid in the event of such acquisition ought to be based on the market value of the subject land as at the date of the publication of s 48 declaration as assessed by the government's valuer.* (Emphasis added.)

[151] Further, it is clear, and is rightly accepted by and in fact agreed between the parties that the award of compensation of RM811,639.89 given by the first appellant was the market value of the subject land as at the date of the s 48 declaration. In the light of this agreement between the parties, it is right to emphasise that the respondent did not as a result of the same testify that the said sum did not represent the market value of the subject land as at the date of the s 48 declaration. It follows from the above that no substantial injustice had been caused to the respondent by the first appellant's mistake in addressing the notice under s 49 of the Land Code to the wrong address of the respondent resulting in her absence from the first inquiry. It is just that in the event that transpired, the said notice was mistakenly sent to the wrong address which mistake, as the evidence has shown, was subsequently remedied by the first appellant.

[152] We will close with a final thought. Let us in this regard revert to the point we earlier raised relating to the question as to whether we should go on to make an order in terms of s 29(1)(b) of Act 359. The declaratory orders, in our judgment, were granted in the improper exercise by the Court of Appeal of its judicial discretion by not taking into account the said undisputed factual findings of the High Court and by drawing conclusions on a false premise and wrong assumption of law that the Court of Appeal, notwithstanding the provisions of s 29(1)(b) of Act 359 and that the subject land has been declared to be needed for a public purpose, could grant in the concluding para 37(a) of the judgment a declaratory order which amounted to an order for the recovery of land against the Government of Sarawak as follows:

> (a) We allow the prayers enumerated at paras 19(i) and (ii) above. The status quo of the subject land prior to the *first resumption exercise* is to be reinstated, meaning *the subject land is to be re-alienated to the appellant pursuant to s 15A of the Land Code*. (Emphasis added.)

[153] In *Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198; [1986] CLJ Rep 149, the Supreme Court at pp 150–151 held:

> It is also well established that such an exercise of discretion will not be interfered with by an appellate Court save in exceptional cases such as where the decision of the trial Judge is shown to be based on erroneous assumptions of law or fact or where no reasonable explanation is given for the decision. It is not enough that the appellate Court might have exercised the discretion differently. See *Equitable Remedies, by Spry, 3rd Edn and Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191. We might add that a decision will be set aside on appeal if the Court has failed to act in accordance with recognized principles.

Reference may also be made to the decision of this court in *Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1982] 2 MLJ 162; [1982] CLJ Rep 182 at p 189 as an authority that an order previously made by the court could be set aside where the exercise of discretion by the court below such as the Court of Appeal herein was based upon a misunderstanding of the law and the fact before it.

[154] Therefore, in our judgment, for the reasons set out in the preceding paras [150]–[152] of this judgment and having regard to the Supreme Court's decision in *Hj Wan Habib bin Syed Mahmud*, the declaratory order to reinstate the subject land to the respondent should be set aside and the respondent is not entitled to any order for recovery of the subject land against the second appellant. For this reason, the necessity for this court to make an order declaring that she is entitled as against the State Government of Sarawak, the second appellant in this appeal, to the subject land does not arise.

[155] In the end, we answer questions (iii), (iv) and (v) in the negative.

[156] For our part, we would accept entirely the submission on behalf of the appellants, forcibly argued before us, as broadly correct and clearly supports the finding that the matter before us is a meritorious appeal. On the contrary, we are unable to discern anything material turns on all the points raised in the respondent's submission to entitle this court to dismiss this appeal. Accordingly, the respondent is unsuccessful in all of her claims for relief. The outcome, as clearly indicated above, is that the appellants' appeal is allowed. We set aside the decision of the Court of Appeal and correspondingly restore the High Court's decision. The parties are ordered to bear their own costs.

Appeal allowed.

Reported by Ashok Kumar